In the Supreme Court of the United States

No. 76-1796

ALBERT E. OTTOBONI, DAVID FERRARI, EMMA OTTOBONI, LOUIS OTTOBONI, ELMER FERRARI, ILVA GIAMPAOLI, CEASER GIANNECCHINI, JOHN GIAMPAOLI, PETER MAZZANTI, IONE J. OTTOBONI, LOUIS W. PELLEGRINI, PATRICIA OTTOBONI, JAMES OTTOBONI, LOUISE CAROLYN OTTOBONI JOHNSON, ALEX C. BEIGEL, HELEN V. DILLINGHAM, FRANCES W. VOUGHT, UNION OIL COMPANY OF CALIFORNIA, a California corporation, MAGMA POWER COMPANY, a Nevada corporation, THERMAL POWER COMPANY, a California corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners pray that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in *United States of America v. Union Oil Company of California, et al.*, No. 74-1574.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 549 F.2d 1271; a copy is attached as Appendix A. The opinion of the

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All emphasis in quotations in this petition has been added, unless otherwise stated.

district court is reported in 369 F.Supp. 1289; a copy is attached as Appendix B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. Its judgment was entered January 31, 1977. Petitioners filed timely petitions for rehearing which were denied March 23, 1977, by an order a copy of which is attached as Appendix C. The district court had jurisdiction under 28 U.S.C. § 1345, the suit being one instituted by the United States.

QUESTIONS PRESENTED

Under the Act of December 29, 1916, the United States granted to homesteaders title to over 35 million acres of land, reserving only rights to "coal and other minerals". Years later the possibilities of natural subterranean heat—"geothermal resources"—came to be realized. As soon as the question arose, the Department of the Interior gave opinion that the reservation of mineral rights in grants under the 1916 Act did not reserve geothermal resources. By the Geothermal Steam Act of 1970, Congress established a procedure for leasing rights to geothermal resources on public lands, specified that *"hereafter"* reservation of "mineral rights" in grants of public land was to be *deemed* to include geothermal resources but that this proviso was not to apply to past grants, acknowledged the opinion of the Department of the Interior that the reservation in past grants did not include geothermal resources, stated that Congress took no position on the subject, and instructed the Secretary of the Interior and the Attorney General to file suit to obtain an "authoritative judicial determination" whether geothermal resources were reserved by the reservation of mineral rights in past grants under the 1916 Act.

The present suit is the test case commenced by the United States to obtain that "authoritative judicial determination". The

district court held in accord with the opinion of the Department of the Interior. The Court of Appeal held to the contrary and reversed, on the reasoning that grants under the 1916 Act were merely grants of surface rights with all subsurface resources retained by the United States and that therefore the word "minerals" in the reservation were to be construed as broad enough to encompass all subsurface estate.

Because of the physical location of acreage having potentiality of geothermal resources, it is improbable that the issue can arise in any circuit but the Ninth.

1. ~~Which view is correct, that of the Department of the Interior and the district court, that the~~ reservation of mineral rights ~~did not~~ include subterranean heat, ~~or that of the Court of Appeals that it did~~?

2. Is not the Supreme Court of the United States the appropriate court to render the "authoritative judicial determination" which the Act of 1970 requests?

STATUTES INVOLVED

Act of Dec. 29, 1916, c. 9; 39 Stat. 862
(43 U.S.C. § 291 et seq.)

Sec. 1 (43 U.S.C. § 291):

"That from and after the passage of this act, it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated unreserved public land in reasonably compact form: *Provided, however,* that the land so entered shall theretofore have been designated by the Secretary of the Interior as 'stock-raising lands'."

Sec. 2 (43 U.S.C. § 292):

"That the Secretary of the Interior is authorized, on application or otherwise, to designate as stock-raising lands subject to entry under this act lands the surface of which is, in his

opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply and are of such character that six hundred and forty acres are reasonably required for the support of a family: . . ."
***

Sec. 3 (43 U.S.C. § 293):

"That any qualified homestead entryman may make entry under the homestead laws of lands so designated by the Secretary of the Interior, according to legal subdivisions, in areas not exceeding six hundred and forty acres, and in compact form so far as may be subject to the provisions of this act, and secure title thereto by compliance with the terms of the homestead laws: . . ."

Sec. 9 (43 U.S.C. § 299):

"That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. . . ."

Geothermal Steam Act of 1970, Pub.L. 91-581, Dec. 24, 1970, 84 Stat. 1566 (30 U.S.C. §§ 1001 et seq.)

Sec. 2 (30 U.S.C. § 1001):

"As used in this act, the term—
***

(b) "geothermal lease" means a lease issued under authority of this chapter;

(c) "geothermal steam and associated geothermal resources" means (i) all products of geothermal processes, embracing indigenous steam, hot water and hot brines; (ii) steam and other gases, hot water and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations; (iii) heat or other associated energy found in geothermal formations; and (iv) any byproduct derived from them; . . ."

Sec. 21 (30 U.S.C. § 1020):
***

"(b) Geothermal resources in lands the surface of which has passed from Federal ownership but in which the minerals have been reserved to the United States shall not be developed or produced except under geothermal leases made pursuant to this act. If the Secretary of the Interior finds that such development is imminent, or that production from a well heretofore drilled on such lands is imminent, he shall so report to the Attorney General, and the Attorney General is authorized and directed to institute an appropriate proceeding in the United States district court of the district in which such lands are located, to quiet the title of the United States in such resources, and if the court determines that the reservation of minerals to the United States in the lands involved included the geothermal resources, to enjoin their production otherwise than under the terms of this chapter: *Provided*, That upon an authoritative judicial determination that Federal mineral reservation does not include geothermal steam and associated geothermal resources the duties of the Secretary of the Interior to report and of the Attorney General to institute proceedings, as hereinbefore set forth, shall cease."

Sec. 25 (30 U.S.C. § 1024):

"As to any land subject to geothermal leasing under section 3 of this act, all laws which either (a) provide for the disposal of land by patent or other form of conveyance or by grant or by operation of law subject to a reservation of any mineral or (b) prevent or restrict the disposal of such land because of the mineral character of the land, shall hereafter be deemed to embrace geothermal

steam and associated geothermal resources as a substance which either must be reserved or must prevent or restrict the disposal of such land, as the case may be. This section shall not be construed to affect grants, patents, or other forms of conveyances made prior to date of enactment of this act."

STATEMENT OF THE CASE

The case concerns the ownership of "geothermal resources" underlying the surface of lands where *the title to the land* had been conveyed to citizens under the Act of 1916 before enactment of the Geothermal Steam Act of 1970.

Geothermal power is nothing more or less than the natural heat of the earth.[1] Molten rock (magma) in the interior of the earth may heat water enclosed in porous rock, and the heat may be exploited by being brought to the surface by steam through drill bores, but neither the rock nor the steam is the geothermal energy, for the rock is not extracted, and the steam is simply a carrier of the heat. Geothermal resources can also be present without a natural transmitting fluid like steam or hot water; "hot dry rock" may be the most abundant form of geothermal energy.[2]

By the Act of 1916, Congress authorized the grant of *title* to as much as 640 acres of public lands, the surface of which, in the opinion of the Secretary of the Interior, was chiefly valuable for grazing and raising forage crops, did not contain merchantable timber, was not susceptible of irrigation from any known source of water supply, and was of such a character that

1. IV. U.S. Dept. of the Interior, *Final Environmental Leasing Program II-10* (1973). House Report No. 91-1544, 91st Cong., 1st Sess.: "Geothermal power is, literally, earth-heat-energy."

2. Hearings on the Potential for the Production of Power from Geothermal Resources before the Subcommittee on Water and Power Resources of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 1st. Sess., pt. 1 at 15 (1973).

640 acres are reasonably required for support of a family (43 U.S.C. § 292). If these conditions were met, "any qualified homestead entryman" could

> "make entry . . . *of lands* . . . and secure *title thereto*" (43 U.S.C. § 293).

The only reservation or limitation upon the title was this:

> ". . . patents issued . . . shall be subject to and contain a reservation to the United States of all the *coal and other minerals* in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." (43 U.S.C. § 299).

When the 1916 Act was passed, Congress "was not aware of geothermal power . . . had no specific intent either to reserve geothermal resources or to pass title to them."[3] It was not until years later that knowledgeable people in the United States came to appreciate the existence of the heat of the earth and to contemplate utilizing it.

Under the 1916 Act the United States granted to one Kidd and to one King lands in Sonoma County, California, in an area known to contain geysers and now called "The Geysers". Petitioners Ottoboni, Ferrari, Giampaoli, Giannecchini, Mazzanti, Pellegrini, Johnson, Beigel, Dillingham and Vought are the successors to the patentees. When the possibility of utilizing geothermal energy came to be realized, petitioners leased their lands to develop geothermal power. Petitioners Union Oil Company of California, Magma Power Company, and Thermal Power Company are now the lessees by mesne assignments.

Largely because of the activities at The Geysers, the public and Congress became aware of the possibilities of geothermal energy, and Congress enacted what is officially known as The Geothermal Steam Act of 1970[4] to reserve the geothermal resources in public

3. So stated in the opinion of the court below (App. 3).
4. So entitled (Sec. 1 of Pub. L. 91-581).

lands for handling by a special lease procedure. Section 25 (30 U.S.C. § 1024) provides that as to any land subject to geothermal leasing:

> ". . . all laws which either (a) provide for the disposal of land . . . subject to a reservation of any mineral . . . shall *hereafter* be *deemed* to embrace geothermal steam and associated geothermal resources as a substance which . . . must be reserved. . . . *This section shall not be construed to affect grants, patents or other forms of conveyance made prior*" to December 24, 1970.

In short, all patents under the 1916 Act, issued after December 24, 1970, were to reserve, in addition to the minerals as specified in the 1916 Act, geothermal resources, and this additional reservation was effected by *thereafter* deeming the reservation of minerals to embrace geothermal resources. However, the 1970 Act explicitly stated that Congress was not assigning this new definition of the term "minerals" in the reservation clause of the Act of 1916 to grants made before 1970.

As stated in the House Report on the bill that became the 1970 Act.[5] "The committee is aware that the Department of the Interior has expressed the view that geothermal steam is not subject to the mineral reservation of the Stockraising Homestead Act of December 29, 1961"[6]. Incorporated in the House Report is the Report of the Department of the Interior to the Chairman of the Committee on Interior and Insular Affairs, dated August 31, 1970. To that are attached copies of two letters to citizens from the Solicitor of the Department, dated December 16, 1965,[7] stating the view of the Department:

5. House Report, No. 91-1544, 91st Cong., 2d sess., reprinted in 3 U.S. Code Cong. & Adm. News 5113, at 5119 (1970).

6. "December 29, 1961" is an obvious misprint for December 29, 1916.

7. 3 U.S. Code Cong. & Adm. News, 5119, at 5126-5128 (1970).

> "A party holding land under a patent issued pursuant to the Stock-Raising Homestead Act would thus have the undisputed right to produce geothermal energy from his land."

Copies of these two letters were appended to the opinion of the district court and appear at pp. 38-40 of the Appendices to this petition. One of the two letters refers to the very land owned by the petitioners Ottoboni.

However, parties interested in acquiring rights to the geothermal heat in opposition to the land-owner argued that the term "minerals" in earlier acts could be construed as embracing geothermal resources.[8] The 1970 Act therefore provided for litigation to determine that question. Section 21(b) provides that if the Secretary of Interior should find that development of geothermal resources other than under "geothermal leases" is imminent in lands theretofore patented with a reservation of the minerals:

> ". . . the Attorney General is authorized and directed to institute an appropriate proceeding . . . to quiet the title of the United States in such resources, and if the court determines that the reservation of minerals to the United States in the lands involved included the geothermal resources, to enjoin their production otherwise than under the terms of this chapter: *Provided,* That upon an *authoritative judicial* determination that Federal mineral reservation does not include geothermal steam and associated geothermal resources the duties of the Secretary of the Interior to report and of the Attorney General to institute proceedings, as hereinbefore set forth, shall cease."

Pursuant to the authority and direction of the statute, the United States commenced the present suit against petitioners in the District Court for the Northern District of California

8. *E.g.,* Memorandum by counsel for Signal Oil Company disputing the Department's opinion, printed in Hearings Before the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 89th Cong., 2d sess., Ser. 89-35, pt. II, at 197-204.

on October 13, 1972.[9] This is the case selected by the United States as the test case.

On motion of defendants to dismiss and motion of the United States for summary judgment quieting title in the United States to "the geothermal steam and associated geothermal resources", the district court, with opinion, dismissed the complaint as failing to state a claim for relief.[10]

The court below reversed and held that the grant to petitioners' predecessors under the 1916 Act conveyed only surface rights.

REASONS FOR GRANTING THE WRIT

There are several reasons why the writ should be granted.

I. Congress Has Requested an Authoritative Judicial Determination of the Issue, and Only This Court Can Give That Authoritative Determination. The Issue Is an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

As just noted, the 1970 Act directed the Attorney General to obtain an "authoritative judicial determination [whether] Federal mineral reservation [includes] geothermal steam and associated geothermal resources" (30 U.S.C. § 1020 (b)). Until an "authoritative judicial determination" is obtained that the mineral reservation does not include geothermal resources, the Secretary of the Interior and the Attorney General remain under certain statutory duties and burdens, and *the development of geothermal resources will be retarded.*

The House Report on the bill that became the Geothermal Steam Act of 1970[11] contains this:

9. A copy of the complaint is attached as Appendix E.
10. A copy of its judgment is attached as Appendix F.
11. 3 U.S. Cong. Code & Adm. News, 5113, 5119 (1970).
In the Report of the Department of the Interior to the House Committee on Interior and Insular Affairs, attached to the House Report, the Department stated: "We realize that it is fully within the province of the Congress to include the provisions of section 20(b) [21(b) as enacted] in this legislation. However we did wish to point out that the provisions of that subsection are inconsistent with these legal opinions of the Department." (3 U.S. Cong. Code & Adm. News, at 5124 (1970)).

> "In order to obtain an authoritative judicial determination of the ownership of geothermal resources in lands the surface of which has passed from Federal ownership with a reservation of minerals to the United States, a new section 20(b) was adopted by the committee. This directs the Attorney General to initiate an appropriate proceeding to quiet the title of the United States to such resources if and when development of such resources occurs or is imminent. The committee is aware that the Department of the Interior has expressed the view that geothermal steam is not subject to the mineral reservation of the Stockraising Homestead Act of December 29, 1961. The committee is also aware that a contrary view has been expressed. As the opinion of the Department is not a conclusive determination of the legal question, *it was the sense of the committee that an early judicial determination of this question (upon which the committee takes no position) is necessary.* At issue is the ownership of geothermal steam on more than 35 million acres of land, the surface of which has passed from Federal ownership but with a reservation of minerals to the United States. The bulk of this acreage was patented under provisions of the Stockraising Homestead Act, and the reserved minerals therein are subject to disposition under appropriate mineral laws. It is not the intent of the committee that this direction to initiate a proceeding in a U. S. district court shall constitute a continuing obligation upon the Attorney General but merely *that an authoritative judicial determination be obtained that the mineral reservation of the Stockraising Homestead Act, and similar acts, does or does not reserve to the United States the geothermal steam. The development of geothermal resources in these lands will be retarded until the question of ownership is determined.*"

Only this Court can give that authoritative determination, and the United States has indicated its expectation that the issue should

be resolved by this Court. Thus on March 28, 1977, the United States executed a stipulation[12] for stay of mandate below pending disposition by this Court of a petition for certiorari, which recites:

> "Considering that this litigation was instituted as a test case, for the purpose of obtaining a final decision of a court of last resort on important questions of statutory construction on which there was, and is, sharp difference of opinion:
>
> "Considering that the final judgment herein will govern the result not only between the immediate parties but also with respect to persons not parties;
>
> "Considering that whichever party received an adverse decision in this Court, that party would likely apply to the Supreme Court of the United States for a writ of certiorari, contending that the issues are important and should be reviewed by that Court;"

This is not the kind of case in which determination by the Court can await resolution of some conflict between circuits. It is a situation like that described in *Schriber Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50 (1938), as calling for certiorari because "litigation elsewhere with a resulting conflict of decision [is] improbable because of concentration of the . . . industry in" the one circuit. The issue can hardly be expected to arise except in the Ninth Circuit, for that is the location of most if not all of the land patented under the Act of 1916 where there is likelihood of geothermal resources. The Secretary of Interior has officially ascertained and determined the location of all land having geothermal resources.[13] By August 1972, 1.8 million acres

12. A copy of the stipulation is attached as Appendix D.

13. 30 U.S.C. § 1020(a) directed him to make the determination and publish it in the Federal Register by April 23, 1971, and to update this periodically. His determinations were summed up in Vol. I, Final Environmental Statement For The Geothermal Leasing Program, U.S. Department of the Interior, 1973, at pp. I-4 *et seq.* U.S. Government Printing Office, Stock Number 2400-00789.

in 44 locations were described as having significant potential for geothermal resource development, and 41 of the 44 are in the Ninth Circuit. Other possible areas of geothermal resources are also overwhelmingly in the Ninth Circuit.[14] As stated in the House Report on the Geothermal Steam Act of 1970,[15] the "one significant commercial development of geothermal steam power in the United States is located at The Geysers in Sonoma County, California * * *."

At stake is not merely the title to millions of acres of land in the Western United States but the integrity of grants by the Government to its citizens. For over 50 years the patentees under the Act of 1916 and other acts providing for patents with mineral reservations, and their successors, have understood that, subject only to the explicit reservation of "minerals", they owned the "land", *i.e.*, the fee. Upon that understanding they have paid taxes and have labored and invested to maximize the utility of their ownership.

Ramifications of the decision below, adversely affecting the rights of Indians under other laws, even now are showing up. As recently as March 1977, the Office of Hearing and Appeals, Interior Board of Land Appeals, United States Department of Interior, held in the matter of the Heirs of Carrie Bethel, IBLA 74-234, that an allotment of land to an Indian must be subject to a reservation of geothermal resources even though the allotment is based upon settlement antedating any knowledge of geothermal resources; part of the reasoning is that under the decision of the court below in the present case, "the geothermal resources in the subject land must be considered to be 'mineral' within the ambit of statutes and regulations authorizing the reservation of minerals". Thus the decision affects the interests of the Indian peoples of the United States in securing rights in their lands against the claims of the United States.

14. II-16 of Final Environmental Statement, supra, fn. 13.

15. 3 U.S. Cong. Code & Adm. News, 5113, 5115 (1970).

II. The Decision Below Is Grossly Erroneous in a Matter Involving the Honor and Integrity of the Government.

The grant under the 1916 Act was a grant of *"title"* to "land" subject to one reservation (Complaint, App. p. 48):

> ". . . reserving to the United States all coal and other minerals in the lands, so entered and patented together with the right to prospect for, mine, and remove the same . . ."

The common understanding of property owners and citizens generally and the traditional learning of lawyers concur on the meaning of "title" to "land". It is the whole bundle of rights below as well as upon the surface. Title is conveyed by metes and bounds on the surface or by other surface description, but that surface description conveys ownership of what is below as well as what is on the surface. Not only is this the common understanding of man. Perhaps the most elementary rule in the corpus of the law, as will be seen by looking into any textbook on the law of property, is that whoever has the title to *land* owns everything to the center of the earth, save only as something has been explicitly *carved out* of the grant by express exception. It matters not whether the textbook was written 200 years ago (Blackstone) or 75 years ago[16] or yesterday.[17] Blackstone, Bk. II, §§ 20, 21 so states; e.g.:

> "So that the word 'land' includes not only the face of the earth, but everything under it, or over it."[18]

The elementary law is summed up in the maxim, *"cuius est solum, eius et usque ad coelum ad inferos"*. As expressed in English in

16. Tiedeman on Real Property (F.H. Thomas Law Book Co., 1892) p. 2.

17. Donahue, Kauper, Martin, "Property" (West Publishing Co. 1974) pp. 298 et seq.

18. Blackstone, Bk. II, § 20 adds: "For *land,* says Sir Edward Coke, comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath . . . It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law . . ." [Italics in original].

California Civil Code, § 829 (enacted 1872 and borrowed from the Field draft Civil Code):

> "The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it."

Even the famous criticism of the scope of the maxim, by Judge Logan (later Senator Logan), dissenting in *Edward v. Sims,* 232 Ky. 791, 24 S.W.2d 619, 622 (1929), a case concerning caves, states:

> "The rule should be that he who owns the surface is the owner of everything that may be taken from the earth and used for his profit and happiness."

Since the statute under which the grants were made provides explicitly for the grant of "title" to the "land", subject only to reservation of "the coal and other minerals", and since the patent by the United States granted the "land", subject only to carve-out of "all the coal and other minerals", the *sole legitimate question* is the meaning of the word "minerals". Just as is the case with respect to the meaning of "title" to "land", the understanding of the common man and of lawyers concurs on a basic requisite of the term "mineral". It means a physical substance, capable of being extracted, transported from the premises, disposed of commercially; the term may not connote all physical substance, but anything not physical is not "mineral". "Mineral" cannot reach what is here in controversy, because what is in controversy is not a physical substance at all. It is not even water.[19] *It is the*

19. Nor are we concerned with the right to the mineral content in solution in waters brought to the surface, where the mineral content is substantial. Cf. *Robinson v. Robbins Petroleum Corp.,* 501 S.W. 2d 865, 867 (Tex. 1973): "Water is never absolutely pure unless it is treated in a laboratory. It is the water with which these parties are concerned and not the dissolved salt. If a mineral in solution or suspension were of such value or character as to justify production of the water for the extraction and use of the mineral content, we would have a different case. The substance extracted might well be the property of the mineral owner, and he might be entitled to use the water for purposes of production of the mineral. [Citations omitted.] In either case the water itself is an incident of surface ownership in the absence of specific conveyancing language to the contrary."

natural heat of the earth. No rational analysis nor precedent can make heat a mineral. As observed by one writer (14 Rocky Mountain Mineral Law Institute at 128).

> "* * * geothermal energy cannot be put into containers or pipelines and transported to distant markets. The value lies not in any physical substance or molecule, but in an event or occurrence. The value is the heat energy released by the very act of production, and this must be utilized within a short distance from the wellhead or the gases and fluids will cool and lose their energy."

Yet the reasoning of the court below does not approach decision by asking and then answering the question, "What is a mineral?" On the contrary, it proceeds in reverse; it asks and presents an answer to a different question, *viz.,* whether Congress in 1916, if it had had the knowledge of the potentialities of the earth's heat that it has today, would have granted title to the land or instead would have granted only an easement to use the surface for stock grazing or agricultural purposes. Such a question no human can answer, for, as the court admits (see p. 7, *supra*), when the Act was passed in 1916 Congress "was not aware of geothermal power . . . had no specific intent either to reserve geothermal resources or to pass title to them." As Congress had no intention to carve out the "geothermal resources" from the grant of title to the land, the grant of the land necessarily carried those resources to the grantee as part of "everything that may be taken from the earth and used for his profit and happiness". Whoever grants title grants whatever unknown values the earth affords, except as may be expressly reserved, and the grantor cannot repent of the scope of this bounty as the future discloses its unexpected breadth.

In short, abandoning the terms of the statute and of the patent, the decision of the court below divides the total interest in the patented land into two estates, a "surface estate" and a "subsurface estate". Then, from the premise that Congress knew

nothing about what uses could be made of the subsurface other than to extract "minerals", the court below deduces that Congress intended to convey a mere easement to use the surface. That is not only a *non sequitur.* It leaves a gap between what was *supposedly* conveyed—the surface—and what was *explicitly* carved out, *viz.,* mineral rights. Since the grant and the carve-out must together embrace everything, no gap is permissible, and therefore the court was put to the necessity of expanding the meaning of "minerals" to fill the gap. The court therefore asserted (App. p. 4) that the "words of the mineral reservation in the . . . Act clearly are capable of bearing a meaning that encompasses geothermal resources". But its basis for this assertion that words reserving minerals in 1916 are capable of bearing a meaning of reserving heat is that in 1970 Congress provided that "hereafter" the words *should* "be deemed to embrace geothermal steam and geothermal resources" (30 U.S.C. § 1024(b)).[20] Anyone writing a contract or a statute may use words in whatever sense he desires so long as he defines the sense in which he uses them. Congress could equally have used *any* word and defined it as including "geothermal steam and associated geothermal resources". The fact that in 1970 it chose to legislate that *in the future* the word "minerals" should be read as including "geothermal steam or geothermal resources" is not the slightest support for the notion that in 1916, when no one even thought of "geothermal steam or geothermal resources", the term had or was capable of bearing any such meaning. *Rainwater v. United States,* 356 U.S. 590, 593 (1958); *United States*

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20. This reasoning is so startling that we quote the opinion so as not to be thought unfair: "When Congress decided in 1970 to remove the issue from controversy as to future grants of public lands, it found it unnecessary to alter the language of existing statutory 'mineral' reservations. It simply provided that such reservations shall *hereafter* be deemed to encompass geothermal steam and associated geothermal resources [citation omitted]. *Thus* the words of the mineral reservation in the Stock-Raising Homestead Act clearly are capable of bearing a meaning that encompasses geothermal resources." (App. p. 4)

v. United Mine Workers, 330 U.S. 258, 282 (1947). And this is doubly so because § 21(b) of 30 U.S.C. concludes:

> "This section shall not be construed to affect grants, patents, or other forms of conveyance made prior to" December 24, 1970.

By arrogating to itself a retroactive legislative capacity, the court below fell into the error of assuming that the total bundle of rights which constitute absolute ownership of land is divisible into two and *only* two classes: (1) surface and (2) subsurface. By aid of this premise, it equates *one* part of the subsurface rights—the minerals rights—with the *whole* of the subsurface rights. But the premise is plainly fallacious. For example, in an opinion rendered in 1924 to the President, dealing with Indian rights, Attorney General Harlan F. Stone, later Chief Justice of the United States, observed (34 Op. Atty. Gen. 181, 189):

> "If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from descriptive terms, there might be some question whether the right of 'occupancy and use' included any *right to the hidden or latent resources of the land, such as minerals* or potential water power, of which the Indians in their original state had no knowledge. . . . Thus the treaty provisions for the allotment of reservation lands all contemplate the final passing of *a perfect fee title* to the individuals of the tribe. And that meant, of course, that *minerals and all other hidden or latent resources* would go with the fee."

In short, "minerals" are but part of the "hidden or latent resources" of the land, and a reservation of part, the minerals, does not carve out of the grant any *other* "hidden or latent resources".

Most Congressmen are lawyers, and lawyer-Congressmen in 1916 had studied law certainly no later than the first decade of the century and were therefore nurtured on Blackstone. Congress

selected as the means of expressing its intentions a *traditional grant of "title" to "land"* limited only by a precise reservation of minerals. As Justice Oliver Wendell Holmes has observed, "The law uses familiar legal expressions in their familiar legal sense", particularly in matters of real estate, *Henry v. United States,* 251 U.S. 393, 395 (1920). Accord: *Bradley v. United States,* 410 U.S. 605, 609 (1973), *United States v. Merriam,* 263 U.S. 179, 187 (1923).

If Congress' intention was what the court below attributes to it, Congress was guilty of using an awkward baggage of words to express a meaning foreign to the ordinary man's understanding, foreign to traditional legal usage: so foreign to the words used that it was rejected by the officials to whom was entrusted the administration of the Act, the Department of the Interior, when the question first arose (see pp. 8, 9, *supra*). Cases like *Udall v. Tallman,* 380 U.S. 1, 16 (1965) require deference to be given to administrative interpretation, but the court below declined to do so here, assigning two reasons for its refusal: It argued first that the "documents . . . do not reflect a contemporaneous construction by administrators who participated in the drafting the Act." (App. p. 15). Since the question was not even within the reach of the human mind when the Act was drafted, there could not have been a construction at that time. The administrative interpretation is wholly contemporaneous with the birth of the question presented, and that is sufficient under the Authorities. The court's second ground for disregarding the administrative interpretation is an assertion that there was an earlier contrary administrative view. The court is mistaken. Its reference is to a letter of January 19, 1961, but that letter related to the wholly different matter of the authority of the Department of Interior under a different statute, the Materials Act of July 31, 1947 (30 U.S.C. § 601 *et seq.*), to dispose of geothermal steam in public lands about which there was no question of title of the United

States.[21] *All* administrative interpretation concerning the meaning of the reservation of the 1916 Act is contrary to the position taken below.

Another error on which the court rested reasoning is assuming that the title of the 1916 Act was "The Stock-Raising Homestead Act", and then relying on that error as "reflect[ing] the nature of the intended grant". But the Act bears no such official title—it is no part of the enactment in 1916 (39 Stat. 862); the name is one of popular usage only.[22]

The error of equating "mineral rights" with all "subsurface" rights is sowed into the very premises of the opinion below, and, thus sowed into the premises, it is extracted as the conclusion. For example, there is a statement that Congress' purpose was to retain government control of "mineral *fuel* resources" and in close juxtaposition is the quite different idea that Congress intended "to retain subsurface resources" (App. 5). Thus by a subtle shift in terminology, "mineral fuel resources" is transmuted into the all inclusive "subsurface resources". Thereby a grant of *land* is degraded into a grant of a mere easement to use the surface, and, in effect, the Government is given title to every cubic inch of soil in the patented lands, excluding only the two-dimensional surface and perhaps room enough for the roots of a crop. To be sure, the opinion below states (App. 14, 15):

> "This is not to say that patentees under the Act were granted no more than a permit to graze livestock . . . To the contrary, a patentee under the Stock-Raising Homestead Act receives title to all rights in the land not reserved."

21. Even as to that opinion of January 19, 1961, relative to the Materials Act, the Department changed its view 7 months later, August 28, 1961, by a *formal* opinion to the Director of the Bureau of Land Management, M-36625, reported in Hearings on S.883 before the Subcommittee on Minerals, Materials, and Fuels of the Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess. 70 (1963).

22. Historical Note to § 291 of 43 U.S.C.A.

A caption, "Stock-Raising Homestead", at 43 U.S.C.A., p. 314, is merely that of the editor and has no value for interpretation. *Ozawa v. United States*, 260 U.S. 178, 193 (1922); *Tibke v. Immigration and Naturalization Service*, 335 F.2d 42, 45 (2 Cir. 1964).

This is an uneasy recognition that what was not reserved was conveyed; yet the method of the opinion is to find what was reserved as the leftover after defining what was conveyed. In the ultimate, the opinion does not state what rights were reserved beyond the use of the surface.

Never before has any court held that a reservation of "minerals" includes all subsurface resources. Nor, despite frequent opportunity to reserve all subsurface resources, has Congress ever seen fit to do so, simple as the use of those words would have been. It did not do so even when it adopted the Geothermal Steam Act of 1970. There, as to public lands still unpatented, it provided for conveyance "subject to a reservation to the United States of the geothermal steam and associated geothermal resources therein", *not* subject to a reservation of the "subsurface estate" (Sec. 3; 30 U.S.C. § 1002). For lands patentable under laws providing for a reservation of minerals, it prescribed that thereafter the word "minerals" was to be deemed to include "geothermal steam and associated geothermal resources", not deemed to extend to all "subsurface estate" (Sec. 25; 30 U.S.C. § 1024). And it recognized a distinction between "geothermal resources" and "minerals" by providing that "geothermal leases should, as far as feasible, allow for coexistence of other leases of the same land for deposits of minerals under the laws applicable to them" (Sec. 17; 30 U.S.C. § 1016).

The holding that everything subsurface was reserved falls before two testing questions: If the water brought to the surface is cold water, is the landowner to be denied the right to use it because it is a "subsurface resource"? Obviously not. The stock-raiser or farmer in 1916 raised water by bucket in a well and later by pipe and pump, and no one would deny his right to use the subsurface water on his land for any purpose. See *City of*

Pasadena v. City of Alhambra, 33 Cal. 2d 908, 925 (1949), *cert. denied*, 339 U.S. 937. The opinion below itself (at App. 17) recognizes that right albeit limiting it to fresh water. But even accepting that unprecedented limitation, it follows that what was reserved cannot be described so broadly as "every subsurface resource." Conversely, if the heat of the earth were not being brought to the surface through water as the carrier, but were to issue forth through natural fissures in the surface, would the landowner be denied the right to utilize and exploit that heat on the supposition that it was a "subsurface resource", reserved to the United States *qua* a mineral? Again, obviously not. Heat has no form or substance; as it is not a material, it cannot be a mineral. Since, then, neither cold subsurface water nor dry subsurface heat is carved out of the grant of the "land" by a reservation of "coal and other minerals", heat brought to the surface by water cannot be deemed a mineral.

The decision below is unprecedented, without foundation in any decided case. All earlier decisions, whether about public or private titles, simply applied the language of the mineral reservation to a particular substance in particular circumstances. In none was decision based on treating a mineral reservation as embracing all "subsurface resources" and as converting the grant of title into a grant of a mere easement to use the physical surface.[23] Yet in no other way could the decision below have been reached.

23. *Skeen v. Lynch*, 48 F.2d 1044 (10 Cir. 1961), cited below in fn. 11, did not do so. There, in a complaint by a patentee under the 1916 Act, the first count sought to quiet title to oil, gas and water but was dismissed for failure to join the United States as an indispensable party. The second count, alleging in an about-face that the oil and gas were minerals reserved to the United States but that plaintiff had a preference right to an oil and gas permit and lease, was dismissed because no statute conferred such a preference. The court added that the assumption that oil and gas were reserved minerals was correct, with a sentence that the purpose of Congress in the use of the phrase "all coal and other minerals" was to "segregate the two estates, the surface for stock raising and agricultural purposes from the mineral estate". And so the reservation did; it did separate the surface from the minerals but it did not separate the surface from other non-mineral values that "may be taken from the earth and used for [the owner's] profit and happiness". The "surface", as contrasted with "subsurface", may be one thing. Contrasted with "mineral estate", surface means the totality of what is traditionally conveyed by a description of the surface, i.e. everything not specifically carved out. To ascribe to the passage a meaning that the 1916 Act reserved all subsurface resources is to accuse the court of indulging in unnecessary dictum upon an issue not before it.

Finally, if "surface" is to be emphasized, exploitation of geothermal heat is a resource attached to the surface, for it has no value below or apart from the surface. "Minerals", coal, crude oil, and natural gas, can all be removed from the land after being brought to the surface and exploited elsewhere, and ordinarily all are. Not so geothermal power; on reaching the surface the superheated water flashes into steam, and the heat must be used then and there or it vanishes.

III. The Decision Below Is Based on an Impermissible Use of Spurious "Legislative History" Outside the Text of the Statute as an Instrument of Statutory Interpretation.

While the use of legislative history as an instrument of statutory interpretation is, of course, legitimate, it is necessary to call halt to impermissible forays. The court below has engaged in an essay into the sociologically desirable, instead of legal and textual analysis in the context of legislative history.[24]

In *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), basic principle was stated thus (p. 617-18):

> "We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. . . . To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution . . . but with part of a legislative

24. Compare, Jackson, J., concurring in *U.S. v. Public Utilities Comm.*, 345 U.S. 295, 319 (1953): interpretation should be based on "analysis of the statute instead of psychoanalysis of Congress."

code 'subject to continuous revision with the changing course of events.'

* * *

". . . But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. . . . For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense."

And in *62 Cases of Jam v. United States,* 340 U.S. 593, 600, the Court cautioned:

> "In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."

The whole structure of reasoning of the opinion below is that if, in 1916, Congress had known more, it would have conveyed less; ergo, now that the court knows what Congress did not know, the grant in fact made by Congress must be diminished. This is "not interpretation of a statute but creation of a statute".[25] Congress expressed its will in "familiar English words", in "familiar legal sense".

If *present* day knowledge of subterranean heat discloses to Congress that it should be less generous, it can be less generous—in future grants. But here we deal with titles to real property, an area where retroactive second thoughts have no legitimacy at all.

Emphasizing the good faith of the United States, this Court has held that where land was granted on the belief that it contained no minerals, under statutes permitting patent only of land not containing minerals, later discovery that the land was mineral-

25. Jackson, J., *supra,* fn. 24.

bearing did not permit any revocation or limitation of the grant. Thus, in *Shaw v. Kellogg,* 170 U.S. 312, 332 (1898), it said:

> "We say 'lands then known to contain mineral', for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. . . . The title was then to pass, and it would be *an insult to the good faith of Congress* to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States."[26]

The reliance of the court below on "legislative history" is faulty. For example, it refers to declarations before 1916 of various officials or public figures that Congress ought to reserve all the subsurface sources of fuel. Probably all legislation is the end product of years of public study and debate about problems; conflicting interests assert their claims; positions and proposals are taken, abandoned, or refined; speeches made, reports rendered. Eventually, the legislature acts, and, when it does, what it does cannot be equated with what ardent advocates of one position or another have espoused. What it does must be interpreted from the words it uses.

As another example, the opinion below refers to a report in 1913 by the Geological Survey, a technical bureau in the Interior Department, which expressed the writer's notion that where land is valuable for two uses, both could be served by "a separation of estates". Doubtless it could be; but in the 1916 Act Congress did not choose to express its will in terms of "separation of estates". It expressed its will by the use of elementary terms, elementary to common understanding and elementary in the law of real estate, so old and common as to have the clearest meaning to any lawyer.

26. To the same effect, *Davis' Adm. v. Weibbold,* 139 U.S. 507 (1891); *Colorado C. & I. Co. v. United States,* 123 U.S. 307 (1887), all followed in *Burke v. Southern Pacific Co.,* 234 U.S. 669 (1914).

The history stated in the opinion below is also incomplete. History does not start with the Act of 1916 or with a purpose of Congress to encourage stock raising. The 1916 Act is one of a long series of statutes beginning years before, whose major and driving purpose was to encourage settlement and development of the West. As a reward for their hardships and efforts, the settlers were to receive *title* to specified allotments of land.[27] The acts prior to 1916 contained reservations of specific minerals. The Act of 1916 changed this to all minerals, but not to all subsurface estate. There remained numerous possibilities of developing land and its resources beyond growing crops, grazing cattle, or extracting minerals, and the pioneer willing to settle the West could look forward to all these future possibilities, then known or unknown. Congress' purpose to forward stock raising on arid land does not negative the right of the patentee or his successors in building towns, cities, subdivisions, resorts, as in Arizona—or in opening up natural underground caves like Carlsbad Caverns for edification of tourists, or any other exploitation if not mineral.

The patentees and their successors have spent money and effort to pioneer geothermal energy in reliance on their title. It is no more honorable for the United States to try to seize this value, so produced, than it would be to seize and transfer to the Park Service a developed cave.

CONCLUSION

We respectfully submit that the petition should be granted to give Congress the authoritative determination of the issue that the 1970 Act states it desires, and to correct an interpretation of the 1916 Act contrary to common public understanding, contrary

27. The provisions in the 1916 Act that lands available to homesteaders had to be "lands the surface of which is . . . chiefly valuable for grazing and raising forage crops" etc., state the conditions on which the United States was willing to make the grant, but they do not limit the grant or alter the fact that the grant was of "title" to the "land", subject only to a reservation of minerals.

to the plain meaning of "familiar legal expressions" used "in their familiar legal sense", contrary to the interpretation of the Department of the Interior, and stamping with approval a breach by the Government of good faith and of its compact with history and the settlement of the West.

Dated: San Francisco, California, June 14, 1977.

MOSES LASKY

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Attorneys for petitioners.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 74-1574

United States of America,
Plaintiff-Appellant,

v.

Union Oil Company of California, et al.,
Defendants-Appellees.

OPINION

[January 31, 1977]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and WALLACE, Circuit Judges,
and *TURRENTINE, District Judge

BROWNING, Circuit Judge:

This is a quiet title action brought by the Attorney General of the United States pursuant to section 21(b) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1020(b), to determine whether the mineral reservation in patents issued under the Stock-Raising Homestead Act of 1916, 43 U.S.C. § 291 *et seq.*, reserved to the United States geothermal resources underlying the patented lands. The district court held that it did not. 369 F. Supp. 1289 (N.D. Cal. 1973). We reverse.

Various elements cooperate to produce geothermal power accessible for use on the surface of the earth. Magma or molten rock

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*Honorable Howard B. Turrentine, United States District Judge, Southern District of California, sitting by designation.

from the core of the earth intrudes into the earth's crust. The magma heats porous rock containing water. The water in turn is heated to temperatures as high as 500 degrees Fahrenheit. As the heated water rises to the surface through a natural vent, or well, it flashes into steam.[1]

Geothermal steam is used to produce electricity by turning generators. In recommending passage of the Geothermal Steam Act of 1970, the Interior and Insular Affairs Committee of the House reported: "[G]eothermal power stands out as a potentially invaluable untapped natural resource. It becomes particularly attractive in this age of growing consciousness of environmental hazards and increasing awareness of the necessity to develop new resources to help meet the Nation's future energy requirements. The Nation's geothermal resources promise to be a relatively pollution-free source of energy, and their development should be encouraged." H.R. Rep. No. 91-1544, 91st Cong., 2d Sess., *reprinted at* 3 U.S. Code Cong. & Admin. News 5113, 5115 (1970).

Appellees are owners, or lessees of owners, of lands in an area known as "The Geysers" in Sonoma County, California. Beneath the lands are sources of geothermal steam. Appellees have developed or seek to develop wells to produce the steam for use in generating electricity. The lands were public lands, patented under the Stock-Raising Homestead Act. All patents issued under that Act are "subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." Section 9 of the Act, 43 U.S.C. § 299. The patents involved in this case contain a reservation

1. Reich v. Commissioner, 52 T.C. 700, 704-05 (1969), *aff'd*, 454 F.2d 1157 (9th Cir. 1972); H.R. Rep. No. 91-1544, 91st Cong., 2d Sess., *reprinted at* 3 U.S. Code Cong. & Admin. News 5113, 5114 (1970); Brooks, *Legal Problems of the Geothermal Industry*, 6 Nat. Resources J. 511, 514-15 (1966); Barnea, *Geothermal Power*, Scientific American, Jan. 1972, at 70, 74.

utilizing the words of the statute.[2] The question is whether the right to produce the geothermal steam passed to the patentees or was retained by the United States under this reservation.

There is no specific reference to geothermal steam and associated resources in the language of the Act or in its legislative history. The reason is evident. Although steam from underground sources was used to generate electricity at the Larderello Field in Italy as early as 1904,[3] the commercial potential of this resource was not generally appreciated in this country for another half century. No geothermal power plants went into production in the United States until 1960.[4] Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act in 1916; it had no specific intention either to reserve geothermal resources or to pass title to them.

It does not necessarily follow that title to geothermal resources passes to homesteader-patentees under the Act. The Act reserves to the United States "all the coal and other minerals." All of the elements of a geothermal system—magma, porous rock strata, even water itself[5]—may be classified as minerals."

2. The reservation reads:

> Excepting and reserving, however, to the United States all coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Stock-Raising Homestead Act.

See 43 C.F.R. § 3814.2(a) (1976).

3. Brooks, *supra* note 1, at 512; Barnea, *supra* note 1, at 71.

4. Barnea, *supra* note 1, at 70. *See* H.R. Rep. No. 91-1544, *supra* note 1, at 5115.

5. Hathorn v. Natural Carbonic Gas Co., 194 N.Y. 326, 87 N.E. 504, 508 (1909); H.R. Rep. No. 91-1544, *supra* note 1, at 5126-27 (letters from Dep't of Interior); A. Ricketts, *American Mining Law* 64, 70 (4th ed. 1943); *Webster's Third Int'l Dictionary* 1437 (1961); 13 *The New Int'l Encyclopedia* 537 (Gilman, Peck, & Colby ed. 1913); 10 *The Americana* (1907-08) (unpaginated article on mineralogy includes water as mineral). *See* Kuntz, *The Law Relating to Oil & Gas in Wyoming*, 3 Wyo. L.J. 107, 109 (1949).

Moreover, geothermal steam has been held to be a "gas." Reich v. Commissioner, 52 T.C. 700, 710-11 (1969), *aff'd*, 454 F.2d 1157 (9th

When Congress decided in 1970 to remove the issue from controversy as to future grants of public lands, it found it unnecessary to alter the language of existing statutory "mineral" reservations. It simply provided that such reservations "shall hereafter be deemed to embrace geothermal steam and associated geothermal resources." Geothermal Steam Act of 1970, 30 U.S.C. § 1024.[6] Thus, the words of the mineral reservation in the Stock-Raising Homestead Act clearly are capable of bearing a meaning that encompasses geothermal resources.

The substantial question is whether it would further Congress's purposes to interpret the words as carrying this meaning. The

Cir. 1972). *See Geothermal Exploration in the First Quarter Century* 185, 187 (Geothermal Resources Council 1973) (letter from George R. Wickham, Ass't Comm'r, Dep't of Interior, July 8, 1924—natural gas is a mineral within purview of mining laws).

No one contends that water cannot be classified as mineral. Appellees argue only that the water should not be included in the term "minerals" in this statutory setting. This is basically a question of legislative intent, dealt with in detail later in the text. To the extent that the argument rests on the meaning of the word itself, however, the government is entitled to have the ambiguity resolved in its favor under "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957). *See* Caldwell v. United States, 250 U.S. 14, 20 (1919); Southern Idaho Conf. Ass'n of Seventh Day Adventists v. United States, 418 F.2d 411, 415 n.8 (9th Cir. 1969).

Appellees argue that the term "minerals" is to be given the meaning it had in the mining industry at the time the Act was adopted, and that this understanding excluded water. This is a minority rule, United States v. Isbell Constru. Co., 78 Interior Dec. 385, 390-91 (1971), even as applied to permit conveyances. 1 American Law of Mining § 3.26, at 551-53 (1976).

6. Members of the Subcommittee on Mines and Mining of the House Comittee on Interior and Insular Affairs went to some lengths to make it clear that whether the term "minerals" as used in prior legislation included geothermal resources was a question for the courts, on which the official position of the 89th Congress was one of neutrality. *See* Hearings on H.R. 7334 *et al.* on Disposition of Geothermal Steam, 89th Cong., 2d Sess., ser. 89-35, pt. II, at 295-96 (1966). The point made here, however, is that in fact Congress thought the term sufficiently broad to encompass such resources.

Act's background, language, and legislative history offer convincing evidence that Congress's general purpose was to transfer to private ownership tracts of semi-arid public land capable of being developed by homesteaders into self-sufficient agricultural units engaged in stock raising and forage farming, but to retain subsurface resources, particularly mineral fuels, in public ownership for conservation and subsequent orderly disposition in the public interest. The agricultural purpose indicates the nature of the grant Congress intended to provide homesteaders via the Act; the purpose of retaining government control over mineral fuel resources indicates the nature of reservations to the United States Congress intended to include in such grants. The dual purposes of the Act would best be served by interpreting the statutory reservation to include geothermal resources.[7]

Events preceding the enactment of the Stock-Raising Homestead Act contribute to an understanding of the intended scope of the Act's mineral reservation. Prior to 1909, public lands were disposed of as either wholly mineral or wholly nonmineral in character. *United States v. Sweet*, 245 U.S. 563, 567-68, 571 (1918). This practice led to inefficiencies and abuses. In 1906 and again in 1907, President Theodore Roosevelt pointed out

7. The Stock-Raising Homestead Act "define[s] the estates to be granted in terms of the intended use. . . The reservation of minerals to the United States should therefore be construed by considering the purposes both of the grant and of the reservation in terms of the use intended." 1 *American Law of Mining* § 3.26, at 552 (1976). *Accord*, United States v. Isbell Constr. Co., 78 Interior Dec. 385, 390 (1971). *See also* United States v. Union Pac. R.R., 353 U.S. 112 (1957); Caldwell v. United States, 250 U.S. 14, 21 (1919).

A similar approach has been taken in construing grants and reservations in deeds between private parties involving minerals. *See, e.g.*, Northern Natural Gas Co. v. Grounds, 441 F.2d 704, 714 (10th Cir. 1971); Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). The "general intent [of the parties] should be arrived at, not by defining and re-defining the terms used, but by considering the *purposes* of the grant or reservation in terms of manner of enjoyment intended in the ensuing interests." Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 Wyo. L.J. 107, 112 (1949) (emphasis in original).

that some public lands were useful for both agriculture and production of subsurface fuels, and that these two uses could best be served by separate disposition of the right to utilize the same land for each purpose. The President called the attention of Congress "to the importance of conserving the supplies of mineral fuels still belonging to the Government." 41 Cong. Rec. 2806 (1907). To that end, the President recommended "enactment of such legislation as would provide for title to and development of the surface land as separate and distinct from the right to the underlying mineral fuels in regions where these may occur, and the disposal of these mineral fuels under a leasing system on conditions which would inure to the benefit of the public as a whole." *Id.*[8]

In 1909 the Secretary of the Interior returned to the same theme, arguing that "inducements for much of the crime and fraud, both constructive and actual, committed under the present system can be prevented by separating the right to mine from the title to the soil. The surface would thereby be open to entry under other laws according to its character and subject to the right to extract the coal. The object to be attained in any such legislation is to conserve the coal deposits as a public utility and to prevent

8. The President said:
> If this Government sells its remaining fuel lands they pass out of its future control. If it now leases them we retain control, and a future Congress will be at liberty to decide whether it will continue or change this policy. Meanwhile, the Government can inaugurate a system which will encourage the separate and independent development of the surface lands for agricultural purposes and the extraction of the mineral fuels in such manner as will best meet the needs of the people and best facilitate the development of manufacturing industries.

41 Cong. Rec. 2806 (1907).

Appellees argue that the executive department statement preceding the enactment of the Stock-Raising Homestead Act dealt primarily with coal deposits. But the concern of the statements was with the conservation of underground energy sources, as the President's references to "fuel lands" and "mineral fuels" illustrate.

monopoly or extortion in their disposition." 1909 Dep't Interior Ann. Rep. pt. I, at 7 (emphasis omitted).[9] The Secretary made the same suggestion with respect to "oil and gas fields in the public domain." *Id.*

In the same year "Congress deviated from its established policy of disposing of public lands under the nonmineral land laws only if they were classified as nonmineral in character and enacted the first of several statutes providing for the sale of lands with the reservation to the United States of certain specified minerals. These statutes were soon followed by statutes providing for the sale of lands with the reservation to the United States of all minerals. . . ." 1 American Law of Mining § 3.23, at 532 (1976).

The first of these statutes "separating the surface right from the right to the underlying minerals" was the Act of March 3, 1909 (35 Stat. 844), 30 U.S.C. § 81, followed shortly by the Acts of June 22, 1910 (36 Stat. 583), 30 U.S.C. §§ 83 *et seq.*, April 30, 1912 (37 Stat. 105), 30 U.S.C. § 90, and August 24, 1912 (37 Stat. 496). *See The Classification of the Public Lands,* 537 U.S. Geological Survey Bull. 45, Department of Interior (1913). In the latter report, the Geological Survey pointed out that where lands were valuable for two uses, both uses could be served by "a separation of estates." The report urged adoption of

9. *See also id.* at 57-58, and the following at 178:
> No principle is more fundamental to real conservation and at the same time more beneficial to the mining and other industries than this of giving preference to the highest possible use for the public lands. The earliest land laws, those of a century ago, provided for the reservation of mineral lands from disposal for other purposes, and the present coal-land law expresses this principle of relative worth by giving gold, silver, and copper deposits priority over the coal, and coal in turn preference over agricultural values. With classification data at hand the principle of relative worth can be further developed. Wherever the different values conflict the higher use should prevail. On the other hand, wherever the different values can be separated that separation by appropriate legislation is at once the easiest and best solution of the problem; for instance, the surface rights may be separated from the right to mine underlying beds of coal.

legislation embodying "the extension of the principle of the separation of estates," plus the leasing of natural resources, as means of protecting such resources without delaying agricultural development.[10]

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10. The report states (45-47):

> The carrying out of the withdrawal policy for protecting the mineral and water resources of the public domain is in many cases rendered difficult and embarrassing by the agricultural value of the land withdrawn. . . . [S]ome of the best farming lands in the West are underlain by coal or phosphate, and some are so situated as to be of strategic importance in power development. Any hindrance to bona fide home building or other agricultural development of the public domain is indeed unfortunate, but in order to protect the public's natural resource withdrawals resulting in such hindrance have been necessary. For certain lands the situation has been relieved by the passage of acts separating the surface right from the right to the underlying minerals. . . .
>
> In carrying out its function of classifying the public lands and in making its fund of information available in the administration of the existing land laws the Geological Survey has become acutely cognizant of the need for certain new legislation. The laws desired are primarily of two types and embody two fundamental necessities—first, the extension of the principle of the separation of estates, and second, the application of the leasing principle to the disposition of natural resources.
>
> As has already been pointed out, the public lands can not be divided into classes each of which is valuable for one purpose only. Instead, the same tract of land may be valuable for two or more resources. In one tract—for example, agricultural land that is underlain by coal—both resources may be utilized at the same time without interfering with each other. In another tract—for example, agricultural land within a reservoir site—the land may be valuable for one resource only until it is utilized for another. In the first case the problem is so to frame the laws that no resource will be forced to await the development of the other. In the second case the problem is to permit the use of the land for one purpose pending its use for another without losing public control of the development of the second. In both cases the answer is found in a separation of estates. The extension of this principle, now applied to coal, to withdrawn and classified minerals and to the uses of water resources would permit the retention of the mineral deposits and power and reservoir sites in public ownership pending appropriate legislation by Congress without in any way retarding agricultural development. Bills have already been introduced applying this principle to oil in other States than Utah and to phosphate in the State of Idaho. It is to be hoped that such bills will be passed and approved, or, better still, that a comprehensive act providing for the separation of the various estates will be introduced and enacted.

In 1914, within a year of this appeal, Congress began consideration of a forerunner of the Stock-Raising Homestead Act. The bill was referred to the Department of Interior for comment, revised by the Department, and reintroduced, H.R. Rep. No. 626, 63d Cong., 2d Sess., *reprinted at* 52 Cong. Rec. 3986-90 (1915). It was enacted into law the following year.

This background supports the conclusion, confirmed by the language of the Stock-Raising Homestead Act, the Committee reports, and the floor debate, that when Congress imposed a mineral reservation upon the Act's land grants, it meant to implement the principle urged by the Department of Interior and retain governmental control of subsurface fuel sources, appropriate for purposes other than stock raising or forage farming.[11]

We turn to the statutory language. The title of the Act—"The Stock-Raising Homestead Act"—reflects the nature of the intended grant. The Act applies only to areas designated by the Secretary of Interior as "stock raising lands"; that is, "lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family. . . ." 43 U.S.C. § 292.

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11. The court in Skeen v. Lynch, 48 F.2d 1044, 1046 (10th Cir. 1931) stated:

> The legislative history of the Stockraising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leaves us no room to doubt that it was the purpose of Congress in the use of the phrase "all coal and other minerals" to segregate the two estates, the surface for stockraising and agricultural purposes from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States.

Although the Supreme Court of New Mexico specifically rejected the *Skeen* analysis in State *ex rel.* State Highway Comm'n v. Trujillo, 82 N.M. 694, 487 P.2d 122, 125 (1971), it did so in reliance upon the absence of an express provision in the Act, especially rejecting an invitation to examine the legislative history.

The entryman is required to make improvements to increase the value of the entry "for stock-raising purposes." *Id.* § 293. On the other hand, "all entries made and patents issued" under the Act must "contain a reservation to the United States of all the coal and other minerals in the lands," and such deposits "shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws." *Id.* § 299. The subsurface estate is dominant; the interest of the homesteader is subject to the right of the owner of reserved mineral deposits to "reenter and occupy so much of the surface" as reasonably necessary to remove the minerals, on payment of damages to crops or improvements. *Id.*

The same themes are explicit in the reports of House and Senate committees. The purpose of the Act is to restore the grazing capacity and hence the meat-producing capacity of semi-arid lands of the west and to furnish homes for the people, while preserving to the United States underlying mineral deposits for conservation and disposition under laws appropriate to that purpose. The report of the House Committee reproduces a letter from the Department of Interior endorsing the bill. The Department notes that "all mineral[s] within the lands are reserved to the United States." H.R. Rep. No. 35, 64th Cong., 1st Sess. 5 (1916). The Department continues, "To issue unconditional patents for these comparatively large entries under the homestead laws might withdraw immense areas from prospecting and mineral development, and without such a reservation the disposition of these lands in the mineral country under agricultural laws would be of doubtful advisability." *Id.* Moreover, "[t]he farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming, which operations can be carried on without being materially interfered with by the reservation of minerals and the prospecting for and removal of same from the land." *Id.* This language is

quoted with approval in S. Rep. No. 348, 64th Cong., 1st Sess. 2 (1916).

Commenting upon the mineral reservation, the House report states:

> It appeared to your committee that many hundreds o[illegible] sands of acres of the lands of the character designated [illegible] this bill contain coal and other minerals, the surface of which is valuable for stock-raising purposes. The purpose of [the provision reserving minerals] is to limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and right to dispose of all minerals underlying the surface thereof. . . .

H.R. Rep. No. 35, *supra*, at 18.

The floor debate is revealing. The bill drew opposition because of the large acreage to be given each patentee. *See, e.g.*, 52 Cong. Rec. 1808-09 (1915) (remarks of Rep. Stafford). In response, supporters emphasized the limited purpose and character of the grant. They pointed out that because the public lands involved were semi-arid, an area of 640 acres was required to support the homesteader and his family by raising livestock. *E.g., Id.* at 1807, 1811-12 (remarks of Reps. Fergusson, Martin, and Lenroot). They also pointed out that the grant was limited to the surface estate,[12] and they emphasized in the strongest terms that all minerals were retained by the United States.

For example, asked whether the reservation would include oil, Congressman Ferris, manager of the bill, responded, "It would. We believe it would cover every kind of mineral. All kinds of minerals are reserved. . . [The bill] merely gives the settler who is possessed of any pluck an opportunity to go out and take 640

12. Representative Burke, explaining the earlier and, for our purposes, identical version of the Act (*see* 53 Cong. Rec. 1170 (1916)), stated that "Section 2 of the bill . . . limits the entry to the surface and provides that the land must be chiefly valuable for grazing and raising forage crops . . . ." 52 Cong. Rec. 1809 (1915).

acres and make a home there." 53 Cong. Rec. 1171 (1916). It was pointed out that oil was not, technically, a "mineral." Congressman Ferris replied, "if the gentleman thinks there is any conceivable doubt about it we will put it in, because not a single gentleman from the West who has been urging this legislation wants anybody to be allowed to homestead mineral land." *Id.* During the closing debate on the Conference report, reference was twice made to the Department of Interior communication quoted above—including the assertion that without a broad mineral reservation the grant would be unjustifiable, and the representation that "the farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming, which operations can be carried on without being materially interfered with by the reservation of minerals and the prospecting for and removal of same from the land." 54 Cong. Rec. 682, 684 (1916).

There is little in the debates to comfort appellees. Appellees cite a discussion between Congressmen Mondell and Ferris, in which Mondell objected to Ferris's describing certain laws as "surface-entry laws for they are not." Congressman Mondell continued, "They convey fee titles. They give the owner much more than the surface, they give him all except the body of the reserved mineral." 53 Cong. Rec. 1233-34 (1916).[13] Representative Mondell was not referring to the Stock-Raising Homestead Act at all, but to three earlier statutes that reserved only particularly named

13. Appellees also observe that the proviso to the mineral reservation in the Act originally stated that "patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this act with reference to the disposition, occupancy, and use *of the surface* of the land," (italics added) and that the italicized phrase was stricken in the House. 53 Cong. Rec. 1233 (1916). The change was made by committee amendment, adopted without explanation or discussion. Even considered alone, its effect is unclear. It may have been thought, for example, that the stricken phrase might be construed to render the broad mineral reservation of the Act inapplicable to patents for a particular mineral, thus inadvertently broadening the mineral grant.

substances, and not minerals generally.[14] Representative Mondell opposed the Stock-Raising Homestead Act's general mineral reservation for the very reason that it restricted the patentee's estate more than the earlier statutes, and to an extent Representative Mondell thought undesirable. Congressman Mondell remarked that the general reservation contained in the Act as adopted rested on "the monarchical theory" which, he asserted, "is to reserve all minerals to the crown, upon the theory that the mere subject is not entitled to anything except the soil that he stirs." 51 Cong. Rec. 10494 (1914).[15] Although Representative Mondell eventually voted for the Act, he continued to protest the scope of the mineral reservation. His closing comment is worthy of notice. It confirms the view that the mineral reservation in the Stock-Raising Homestead Act was novel in its breadth. It also reveals that this broad reservation of subsurface resources was included at the insistence of the Department of Interior because of the large surface acreage granted under the Act:

> . . . the fact should be emphasized that the bill establishes a new method and theory with regard to minerals in the land legislation in our country. It reverts back to the ancient doctrine of the ownership of the mineral by the king or the crown and reserves specifically everything that is mineral in all the land entered. It was, it was claimed, necessary to accept a provision of that kind in order to secure the larger acreage. The Interior Department insisted upon it, and many supported that view. My own opinion is that that policy is not wise and that in the long run it will be found to be infinitely more harmful than beneficial or useful or helpful to anyone, either the individual or the public generally. When one takes into consideration the wide range of sub-

14. Act of Mar. 3, 1909, 35 Stat. 844, 30 U.S.C. § 81 (coal); Act of June 22, 1910, 36 Stat. 583, 30 U.S.C. §§ 83 *et seq.* (coal); Act of July 17, 1914, 38 Stat. 509, 30 U.S.C. §§ 121 *et seq.* (phosphate, nitrate, potash, oil, gas, or asphaltic minerals).

15. *See also* 52 Cong. Rec. 1809 (1915).

> stances classed as mineral, the actual ownership under a complete mineral reservation becomes a doubtful question.

54 Cong. Rec. 687 (1916).[16]

Appellees argue that references in the Congressional Record to homesteaders' drilling wells and developing springs[17] indicate that Congress intended title to underground water to pass to patentees under the Act. These references are not to the development of geothermal resources. As we have seen, commercial development of such resources was not contemplated in this country when the Stock-Raising Homestead Act was passed. Moreover, in context, the references are to the development of a source of fresh water for the use of livestock, not to the tapping of underground sources of energy for use in generating electricity.[18]

This review of the legislative history demonstrates that the purposes of the Act were to provide homesteaders with a portion of the public domain sufficient to enable them to support their families by raising livestock, and to reserve unrelated subsurface resources, particularly energy sources, for separate disposition. This is not to say that patentees under the Act were granted no

16. Congressman Raker also linked to the size of the surface grant with the breadth of the reservation of subsurface resources. 52 Cong. Rec. (App.) 521 (1915).

17. 52 Cong. Rec. 1810 (1915); 52 Cong. Rec. (App) 521 (1915); 53 Cong. Rec. 1127, 1170 (1916).

18. "A fair and reasonable [ruling] would hold the surface owner to be entitled only to fresh waters that reasonably serve and give value to his surface ownership. Salt water and geothermal steam and brines should be held the property of the mineral owner who owns such substances as oil, gas and coal, since the functions and values are more closely related. Geothermal steam is a source of energy just as fossil fuels such as oil, gas and coal are sources of energy." Olpin, *The Law of Geothermal Resources*, 14 Rocky Mountain Mineral Law Institute 123, 140-41 (1968). *See* Reich v. Commissioner, 52 T.C. 700 (1969), *aff'd* 454 F.2d 1157 (9th Cir. 1972); Allen, *Legal and Policy Aspects of Geothermal Resources Development*, 8 Water Resources Bull. 250, 253-54 (1972).

more than a permit to graze livestock, as under the Taylor-Grazing Act, 43 U.S.C. §§ 315 *et seq*. To the contrary, a patentee under the Stock-Raising Homestead Act receives title to all rights in the land not reserved. It does mean, however, that the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest. Geothermal resources contribute nothing to the capacity of the surface estate to sustain livestock. They are depletable subsurface reservoirs of energy, akin to deposits of coal and oil, which it was the particular objective of the reservation clause to retain in public ownership. The purposes of the Act will be served by including geothermal resources in the statute's reservation of "all the coal and other minerals." Since the words employed are broad enough to encompass this result, the Act should be so interpreted.

Appellees assert that the Department of Interior has expressed the opinion that the mineral reservation in the Act does not include geothermal resources, and that this administrative interpretation is entitled to deference under *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and similar authority. The documents upon which appellees rely do not reflect a contemporaneous construction by administrators who participated in drafting the Act to which courts give great weight in interpreting statutes.[19] Nor is

19. Zuber v. Allen, 396 U.S. 168, 193 (1969); Power Reactor Dev. Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396, 408 (1961); United States v. American Trucking Ass'ns, 310 U.S. 534, 549 (1940).

Appellees rely upon three letters by officials of the Department of Interior stating that "geothermal steam" is not a "mineral" within the meaning of the mining laws or the mineral reservation. Two of the letters, both dated Dec. 16, 1965, are responses by Edward Weinberg, Deputy Solicitor, to letters of inquiry from interested citizens. They are reproduced in an appendix to the district court's opinion, 369 F. Supp. at 1300-02, and as part of H.R. Rep. No. 91-1544, *supra* note 1, at 5126-28.

this a case in which Congress has approved an administrative interpretation, explicitly or implicitly.[20] On the contrary, Congress noted the Department of Interior's interpretation, observed that a contrary view had been expressed, concluded that "the opinion of the Department is not a conclusive determination of the legal question . . .," and provided for "an early judicial determination of this question (upon which the committee takes no

The third letter was written by the Associate Solicitor for Public Lands to counsel for appellee Magma Power Company on Feb. 16, 1966, and apparently has not been published.

The letters do not reflect an agency view contemporaneous with the passage of the Act—they were written a half century after the statute was adopted. Appellees also rely upon a Department of Interior memorandum from Edward Fischer, Acting Solicitor, to the Director of Bureau of Land Management, stating that geothermal steam is not a "mineral material" for the purposes of the Mineral Act of 1947, 30 U.S.C. § 601. Dep't Interior Mem. M-36625, Aug. 18, 1961. But this view is contrary to that expressed by Solicitor Stevens only seven months earlier in a letter to appelle Magma Power Company dated Jan. 19, 1961. Brooks, *supra* note 1, at 524 & n.56; Note, *Acquisition of Geothermal Rights,* I Idaho L. Rev. 49, 56 & n.44 (1964). This inconsistency, *see* Hearings on H.R. 7334 *et al.* before the Subcomm. on Mines & Mining of the House Comm. on Interior and Insular Affairs, 89th Cong., 2d Sess., ser. 89-35, pt. II, at 194-95 (1966) (statement of Emmet Wolter), is another factor indicating that we should not accord deference to the administrative construction. *See* Udall v. Tallman, 380 U.S. 1, 17 (1965).

Moreover, the expressions of opinion relied upon by appellees are weakly reasoned. They rest entirely upon the premise that geothermal resources are simply water. Water, the argument then proceeds, ordinarily is not included in mineral reservations by the courts, or treated as a mineral in public land laws. But all of the court decisions relied upon in the communications concern fresh water brought to the surface by means of a well. *See* Mack Oil Co. v. Laurence, 389 P.2d 955 (Okla. 1964); Fleming Foundation v. Texaco, 337 S.W.2d 846 (Tex. Civ. App. 1960). *See* Estate of Genevra O'Brien, 8 Oil & Gas 845 (N.D. Tex. 1957) (charge of the court). And if geothermal resources are indeed "water," the later enactment of the Geothermal Steam Act has undercut the statement that "water" is not treated as a mineral in public land laws. But the principle deficiency in the documents relied upon by appellees is this: the sole question is the meaning of the statute; the answer therefore turns entirely upon the intent of Congress, and the documents do not mention that subject at all.

20. *See, e.g.,* Power Reactor Dev. Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396, 408-09 (1961).

position)." H.R. Rep. No. 91-1544, 91st Cong., 2d Sess., *reprinted at* 3 U.S. Code Cong. & Admin. News 5113, 5119 (1970).

Appellees contend that enactment of the Underground-Water Reclamation Act of 1919, 43 U.S.C. §§ 351 *et seq.,* three years after passage of the Stock-Raising Homestead Act indicates that Congress did not consider subsurface water to be a "mineral." We disagree; indeed, the more reasonable implication seems to us to be to the contrary.[21]

The district court granted appellees' motion to dismiss for failure to state a claim upon which relief could be granted. 369 F. Supp. at 1299. The State of California, as amicus, suggests that questions of fact are presented as to the nature of geothermal resources. We are persuaded that the facts necessary to decision are not disputed. The appeal presents only a question of law as to the proper construction of the statute, which we have answered.

21. The Underground-Water Reclamation Act authorizes the issuance of permits to explore for underground water on not to exceed 2,560 acres of public lands in Nevada (§ 351). The Act provides that if a permittee discovers and makes available for use a supply of underground water in sufficient quantity "to produce at a profit agricultural crops other than native grasses upon not less than twenty acres of land," he will be entitled to a patent on 640 acres of the public land embraced in his permit (§ 355). The Act further provides for reservation of "all the coal and other valuable minerals in the lands" patented (§ 359). Appellees argue that the term "minerals" in the latter provision must not include underground water, for if it did the reservation would deprive the patentee of the very water he had discovered.

But again, the obvious distinction is between underground water suitable for agricultural purposes and geothermal resources. The purpose of the Underground-Water Reclamation Act is fully realized and all of its provisions made fully effective if the term "minerals" is read to exclude the former but include the latter. As noted in the text, the significance of the Underground-Water Reclamation Act may be the opposite of that suggested by appellees when the statute is considered in conjunction with the Geothermal Steam Act of 1970, for the latter statute was adopted on the premise that existing legislation, presumably including the Underground-Water Reclamation Act of 1919, did not authorize the Department of Interior to dispose of geothermal resources in public lands. *See, e.g.,* H.R. Rep. No. 91-1544, *supra* note 1, at 5115.

Whether the United States is estopped from interfering with the rights of private lessees without compensating them for any losses they may sustain will be open on remand.

Reversed and remanded.

Appendix B

In the United States District Court
for the Northern District of California

Civil No. 72-1866 GBH

United States of America,

Plaintiff,

v.

Union Oil Company of California,
a California corporation, et al.,

Defendants.

MEMORANDUM OF DECISION

I. INTRODUCTION

This matter is before the court on the motion of certain defendants to dismiss for failure to state a claim upon which relief can be granted, and on the counter-motion of plaintiff United States for summary judgment in its favor. The defendants joined in the motion to dismiss are as follows: Union Oil Company of California; Magma Power Company; Thermal Power Company; Alex C. Beigel; Helen V. Dillingham; Frances W. Vought; Louis W. Pellegrini; Ione J. Ottoboni; Patricia Ottoboni; Louis Ottoboni; James Ottoboni; Emma Ottoboni; Albert Ottoboni; Peter Mazzanti; Mrs. Louis Ottoboni Johnson; Ceasar Gianecchini; John Giampaoli; Ilva Giampaoli; Elmer Ferrari; and David Ferrari.

The case arises from a complaint filed herein on October 13, 1972, by which the United States seeks a declaration of its ownership rights in the geothermal steam and associated geothermal resources presently being produced by certain defendants under leases from other defendants. The United States also seeks injunctive relief and damage in the amount of the reasonable rental

value of such leased lands for geothermal steam and associated geothermal resources and of the reasonable royalty of the geothermal steam and associated geothermal resources produced therefrom in accordance with the provisions of the Geothermal Steam Act of 1970, 30 U.S.C. § 1001 et seq. The leased lands in question, all of which lie in Sonoma County, California, were granted to defendants' predecessors in interest by patents issued under the Stock Raising Homestead Act of 1916, 43 U.S.C. § 291 et seq. [hereinafter sometimes called the "Act"], and thereafter devolved to certain of the defendants by mesne conveyances.

The claim of the United States is based upon the following language in § 9 of the Stock Raising Homestead Act (43 U.S.C. § 299):

> All entries made and patents issued under the provisions of sections 291-301 of this title shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. * * *

It is the position of the United States that the reservation of "all the coal and other minerals" contained in § 9 and in the patents granted thereunder to defendants' predecessors in interest severed the subsurface estate in its entirety from the surface estate, reserving the former to the United States and granting only the latter, thus reserving to the United States the right to "prospect for, mine, and remove" geothermal steam and associated geothermal resources.

Because of uncertainty over whether a mineral reservation such as that cited above encompassed geothermal resources,[1] Congress included § 21(b) in the Geothermal Steam Act of 1970 (30 U.S.C. § 1020(b)) to test its title thereto:

1. The basis for such uncertainty is discussed hereinafter; it is summarized in House Report No. 91-1544 on Public Law 91-581, the Geothermal Steam Act of 1970. 3 U.S. Code Cong. & Adm. News 5113 at 5115, 5119 (91st Cong., 2d Sess., 1970):

> One reason for the lack of development of the geothermal steam potential of the United States can be directly attributed to the absence of reliable statutory authority to permit its development on public lands. The Department of the Interior has taken the position that it lacks authority to dispose of this resource on lands under its jurisdiction. * * *
> * * *
> In order to obtain an authoritative judicial determination of the ownership of geothermal resources in lands the suface of which has passed from Federal ownership with a reservation of minerals to the United States, a new section 20(b) was adopted by the committee. This directs the Attorney General to initiate an appropriate proceeding to quiet title of the United States to such resources if and when development of such resources occurs or is imminent. The committee is aware that the Department of the Interior has expressed the view that geothermal steam is not subject to the mineral reservation of the Stockraising Homestead Act of December 29, 1916. The committee is also aware that a contrary view has been expressed. As the opinion of the Department is not a conclusive determination of the legal question, it was the sense of the committee that an early judicial determination of this question (upon which the committee takes no position) is necessary. * * *

> Geothermal resources in lands the surface of which has passed from Federal ownership but in which the minerals have been reserved to the United States shall not be developed or produced except under geothermal leases made pursuant to this chapter. If the Secretary of the Interior finds that such development is imminent, or that production from a well heretofore drilled on such lands is imminent, he shall so report to the Attorney General, and the Attorney General is authorized and directed to institute an appropriate proceeding in the United States district court of the district in which such lands are located, to quiet the title of the United States in such resources, and if the court determines that the reservation of minerals to the United States in the lands involved included the geothermal resources, to enjoin their production otherwise than under the terms of this chapter: *Provided,* That upon an authoritative judicial determination that Federal mineral reservation does not include geothermal steam and associated resources the duties of the Secretary of the Interior to report and of the Attorney General to institute proceedings as hereinbefore set forth, shall cease.

The instant case is such an "appropriate proceeding."

II. DISCUSSION

The central issue here concerns the meaning and scope of the mineral reservation in the Stock Raising Homestead Act and in the patents granted thereunder. In order to properly construe such reservation, the intent of Congress at the time of the enactment of the Act and under the circumstances then present must be ascertained. *See Moor v. County of Alameda,* 411 U.S. 693, 709 (1973); *United States v. Stewart,* 311 U.S. 60, 69 (1940). Although the clear meaning of statutory language is not to be ignored, " '[w]ords are inexact tools at best' . . . and hence it is essential that we place the words of a statute in their proper context by resort to legislative history." *Tidewater Oil Co. v. United States,* 409 U.S. 151, 157 (1972).

Such intent may be gleaned from several factors, including pertinent committee reports,[2] statements from its sponsors,[3] floor debates,[4] the act's title,[5] successive drafts,[6] and the general purpose of the legislation.[7]

In addition, it is the accepted rule of construction that when a grant of land is made by a public body, such as the United States, the language of such grant (and of any reservations therein), if ambiguous, is to be construed strictly against the grantee and

2. *United States v. St. Paul M. & M. Ry. Co.,* 247 U.S. 310, 318 (1918).

3. *Woodwork Manufacturers v. NLRB,* 386 U.S. 612, 640 (1967).

4. *United States v. San Francisco,* 310 U.S. 16, 22n.10 (1940); *United States v. Hendler,* 225 F.2d 106, 109 (10th Cir. 1955).

5. *Brown v. Glick Bros. Lumber Co.,* 52 F.Supp. 913, 916 (S.D. Cal. 1943), *rev'd on other grounds,* 146 F.2d 566 (9th Cir. 1945).

6. *Bowles v. Goebel,* 58 F.Supp. 686, 688 (N.D. 1945), *aff'd* 151 F.2d 671 (8th Cir. 1945).

7. *United States v. Shirey,* 359 U.S. 255, 260-261 (1959).

broadly in favor of the public body.[8] This rule is the reverse of the normal rule of construction which requires strict construction against the draftsman of the instrument in question (generally the grantor).[9]

The Stock Raising Homestead Act grew from Congressional desire to give homesteaders title to substantial-sized tracts of land in the semi-arid states of the West where they could raise livestock and engage in agriculture, thus promoting the settlement and prosperity of such states.

In 1914, a forerunner of the Act was submitted to the House of Representatives, 63d Cong., as H.R. 9582. This bill contained a section reserving to the United States "all the minerals and coal in the lands so entered." 52 Cong. Rec. 3987 (63d Cong., 3d Sess., 1915). The bill was submitted to the Department of the Interior for comment. The Department, through the First Assistant Secretary, commented on H.R. 9582 and on related bill H.R. 6637 and submitted the draft of a proposed revised bill. This substitute, which became H.R. 15799, provided for a reservation "of all the coal and other minerals." *Id.* at 3988.

Representative Raker of California made the following remarks on H.R. 15799:

> One of the purposes of the bill is to restore and improve the grazing capacity of the lands, and therefore stock raising and meat-producing capacity of the semiarid lands of the West, and at the same time to furnish homes thereon for the people of this country who are desirous of acquiring a home in the semiarid country. 52 Cong. Rec. App. 520 (63d Cong., 3d Sess., 1915).
>
> * * *

8. *See United States v. Union Pacific R. Co.,* 353 U.S. 112, 116 (1957); *Oregon Short Line Railroad Company v. Murray City,* 2 Utah 2d 427, 277 P.2d 798, 802 (Utah 1954); 3 Sutherland on Statutory Construction § 6402 (3d ed. 1943); 1 Lindley on Mines § 96 (3d ed. 1914).

9. *See* 3 Sutherland § 6503.

> We want homes and not tenants even if the Government of the United States should be that landlord. If water should be later discovered by boring deep wells, then so much the better. The pioneer, who has gone through all the hardship and privations, will be the man to be benefited. We hope he may. *Id.* at 521.

This bill passed the House, but was not, however, passed by the Senate. Representative Taylor of Colorado explained why as he introduced an identical bill to the next session of Congress:

> This bill [H.R. 407] has been before Congress for two years. This is almost an exact copy of the bill on this subject which passed this House a year ago next Tuesday, January 18, 1915. * * *
>
> * * *
>
> As stated by the commissioner, it was favorably reported by the Senate Public Lands Committee, but owing to the long debate upon the shipping bill, and there being a large number of other important measures upon the Senate calendar ahead of it, the bill failed of passage.
>
> The present bill as introduced is an identical copy of the bill as it passed the House during the last congress. 53 Cong. Rec. 1126 (64th Cong., 1st Sess., 1916).

In debate, Representative Moore of Pennsylvania asked whether the mineral reservation clause in § 10 of the proposed act covered the Government's interest in oil lands. Representatives Moore and Ferris of Oklahoma then engaged in the following colloquy:

> MR. FERRIS. It would. We believe it would cover every kind of mineral. All kinds of minerals are reserved . . . .
>
> MR. MOORE of Pennsylvania. If any oil should be discovered on these lands later on, the Government's right to that oil would be preserved under the mineral clause, would it?
>
> MR. FERRIS. Yes; and further, this act authorizes the reentry upon these lands to extract oil and coal and anything else in the way of minerals that may be on it.

> MR. MOORE of Pennsylvania. The gentleman does not think it is necessary to specify oil?
>
> MR. FERRIS. No. That is a mineral. But I have no objection to it being mentioned specifically if it is at all thought necessary. I feel doubly sure, however, it is not.
>
> MR. MOORE of Pennsylvania. It has been called to my attention that the word "mineral" would not include oil.
>
> MR. FERRIS. I do not think it is necessary; but if the gentleman thinks there is any conceivable doubt about it we will put it in, because not a single gentleman from the West who has been urging this legislation wants anybody to be allowed to homestead mineral land * * * But these gentlemen who are interested in it do not want to homestead mineral land or ordinary homestead land or oil land. 53 Cong. Rec. 1171 (64th Cong., 1st Sess., 1916).

In attempting to ascertain the intent of Congress with respect to the mineral reservation contained in the Act, several points become clear. *First,* it is evident from the debates, reports and other legislative history that provision for the reservation of minerals played a minor role in Congressional consideration of the Act. *Second,* it was the intent of Congress that the homesteader receive title to land granted to him by patent under the Act, and that the full mineral estate, including all substances definable as minerals, be reserved to the United States. *Third,* Congress did not intend to reserve geothermal steam and associated geothermal resources because such fluids would not have come within the definitions of "minerals" in force and usage at that time.

The United States argues that patents granted under the Act established two separate estates: the surface estate, which passed to the patentee, and the subsurface (mineral) estate which was reserved to the United States. In support of this position the United States points to certain language in the Act. Section 2 (43 U.S.C. § 292) provides in part cited:

> The Secretary of the Interior is authorized, on application or otherwise, to designate as stock-raising lands subject to entry under sections 291-301 of this title lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family * * *

Section 9 (43 U.S.C. § 299) provides in part cited:

> * * *
>
> Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals * * *

The United States also cites certain legislative history in support of its position, as well as the case of *Skeen v. Lynch,* 48 F.2d 1044 (10th Cir. 1931), *cert. den.,* 284 U.S. 633 (1931). These scattered authorities do not, however, mandate the result sought here by the Government.

Patents under the Act do not grant only the surface estate nor do they reserve the entirety of the subsurface estate. The reservation contained in § 9 speaks of "coal and other minerals"; Congress could have reserved "the subsurface estate" if that is what it desired, but it did not so desire and therefore did not do so. The language quoted above from § 9 merely provides for a right of reentry necessary for the mining and removal of coal and other minerals reserved by the United States. The language quoted from § 2 does not say that land will not be patented; rather it defines such lands by reason of the expected activity to be carried on upon the surface thereof.

Despite the gratuitous references to surface entry which appear in the legislative history of the Act, there is also commentary

which supports the position of the defendants here that what passed under an Act patent was fee title, and not just the surface estate with a reservation of the subsurface.

When the predecessor of the Act was proposed before the 63d Congress, Representative Fergusson of New Mexico made the following comment:

> Mr. Speaker, the object of this bill is to restore the beef and mutton producing capacity of the semiarid states of the West, and at the same time enable the settlers to get homes, and thus promote the settlement and prosperity of these semiarid states by inducing settlers to get title to the land and to become taxpayers. 52 Cong. Rec. 1807 (63d Cong., 3d Sess., 1915).

And thus did Representative Raker indicate his belief that the homesteader would be entitled to keep any water he might find in the land granted to him. 52 Cong. Rec. App. 521 *supra.*

Revealing here is the following colloquy between Representative Ferris and Representative Mondell of Wyoming:

> MR. FERRIS. Mr. Chairman, on page 7, lines 24 and 25, and on page 8 this law is made subject to all of the three surface-entry bills that we have passed, and those three laws provide for damage and everything else.
>
> MR. MONDELL. Where is that?
>
> MR. FERRIS. On page 7, lines 24 and 25:
>
> The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.
>
> MR. MONDELL. Those are not the so-called limited-entry laws, affecting the limited entryman, but the laws affecting the miner.
>
> MR. FERRIS. The three surface-entry acts already passed. They are the laws already referred to.
>
> MR. MONDELL. The gentleman is entirely mistaken, and, further, I wish he would not call the laws he refers to

surface-entry laws, for they are not. They convey fee titles. They give the owner much more than the surface; they give him all except the body of the reserved mineral. 53 Cong. Rec. 1233-1234 (64th Cong., 1st Sess., 1916)

Skeen v. Lynch, supra, relied upon by the United States, was a quiet title action brought against the Government under the Stock Raising Homestead Act. The plaintiff there contended that he owned the water, oil and gas in and under land patented to him pursuant to the Act and that such was not retained by the United States by its reservation of "coal and other minerals." The court concluded, 48 F.2d at 1046:

> We accept the assumed fact [that oil and gas were reserved to the United States] as irrefutable. The legislative history of the Stockraising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leave us no room to doubt that it was the purpose of Congress in the use of "all coal and other minerals" to segregate the two estates, the surface for stockraising and agricultural purposes from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States. * * *

With evidence of a contrary legislative intent such as that cited hereinabove, however, the conclusion reached by the *Skeen* court leaves considerable room for doubt. A more recent case, *State ex rel. State Highway Commission v. Trujillo,* 82 N.M. 694, 487 P.2d 122 (N.M. 1971), gives greater credence to the expressed intent of Congress and therefore limits *Skeen,* a result with which this court is in agreement.

Trujillo involved an appeal in a condemnation case in which it had been determined below that road building material from certain landowners' property belonged to the Government under the reservation contained in the Stock Raising Homestead Act and the patents granted thereunder and that as a consequence the

Government need not have reimbursed the landowners for taking such material (there a substance called monzonite).

The trial court had held that the mineral reservation severed the surface estate from the mineral subsurface estate and that the patents had reserved all face rights to the Government.

On appeal, the Supreme Court of New Mexico disagreed, holding that the reservation of "coal and the other minerals" was not intended to include rock, such as monzonite. The court discussed and distinguished *Skeen,* finding the "two estate" analysis used there unnecessary. The court said at 125:

> We find nothing in the statute as enacted which indicates an intention to create use of the surface only. Had such been the intention of the Congress, it would have been a simple matter for it to have said so. Rather than reserving *all* the subsurface estate only minerals *in* the land were reserved.
>
> Although we have no quarrel with the result of Skeen that oil and gas are minerals, we cannot subscribe to the theory of Skeen and the trial court that the Congress intended the entryman to have use of the surface only.

Other cases support the conclusion that the patents granted here conveyed title to the land and not just use of the surface. *Cf. Schwab v. Beam,* 86 F. 41, 43 (10th Cir. 1898); *Mortenson v. Financial Growth, Inc.,* 23 Utah 2d 54, 456 P.2d 181, 183 (Utah 1969).

The Government's next argument is that geothermal steam and associated geothermal resources were reserved to the United States because they are "minerals" within the meaning of the mineral reservation in § 9 of the Act and the patents granted thereunder.

Webster's Third International Dictionary (1965) defines "geothermal" as "of or relating to the heat of the earth's interior." Section 2(c) of the Geothermal Steam Act of 1970 (30 U.S.C. § 1001(c)) provides the following definitions:

(c) "geothermal steam and associated geothermal resources" means (i) all products of geothermal processes, embracing indigenous steam, hot water and hot brines; (ii) steam and other gases, hot water and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations; (iii) heat or other associated energy found in geothermal formations; and (iv) any by-product derived from them;

"Geothermal energy" has been defined most succinctly as "the natural heat of the earth which can be extracted in the form of hot water and/or water vapor (steam)." State of Calif., The Resources Agency, Energy in California 38 (Jan. 1973).

Geothermal manifestations have been noted by man since the first century B.C.[10] The first commercial development, however, did not occur until 1818, when the geothermal steam of the Larderello area in Italy was used to provide heat in order to concentrate the boric acid which was found in solution in the boiling waters. Geothermal energy was not applied to electrical power until 1904, when Prince Conti of Larderello succeeded in operating a geothermal steam-driven dynamo which lighted five electric lamps. By the late 1930's the Larderello fumarole area, consisting roughly of 100 sq. miles, was producing almost 100,000 kw. of electric power.

Despite the Italian successes, little attention was paid to geothermal development elsewhere except for the use of steam and hot water in geyser areas in Iceland and in parts of the Soviet Union. In 1950 a major geothermal project was launched in New Zealand.

In the United States, geothermal steam was not generally regarded as suitable for commercial development until quite

10. This history of the development of geothermal energy is taken primarily from J. Brooks, Jr., "Legal Problems of the Geothermal Industry," 6 Nat. Resources J. 511 *passim* (1966) and sources cited therein.

recently.[11] What geothermal exploration has occurred has been concentrated in the West, most notably California. The first commercial geothermal power plant in California became operative in 1960 at The Geysers in Sonoma County. As of 1971, geothermal fluids were being used to heat buildings and even whole cities in such places as the United States, the Soviet Union, Iceland, Hungary, Japan and New Zealand.[12]

Virtually all the literature on the nature and development of geothermal resources in the United States dates from after World War II.[13] Indeed, the parties have cited no literature in existence at the time when the Stock Raising Homestead Act was presented, debated or passed which would indicate an awareness on the part of Congress that such resources had to be accounted for. It is hardly surprising, then, that the legislative history of the Stock Raising Act includes no references to geothermal phenomena nor that any mention thereof appears in the reservation of § 9.[14]

11. 3 U.S. Code Cong. & Adm. News 5115 (91st Cong., 2d Sess., 1970).

12. State of Calif., The Resources Agency, The Economic Potential of Geothermal Resources in California: a Report of the Findings and Recommendations in Response to Senate Resolution 331 (1970) at 11 (Jan. 1971).

13. *E.g.*, the selected bibliography in *id.*, footnote 12, lists 28 items, of which one is dated 1942, one 1944, and the remainder 1960 or later. One earlier source is N.H. Darton, "Geothermal Data of the United States" (U.S. Geological Survey Bull. No. 701, 1920).

14. The fact that geothermal steam or associated geothermal resources were not known at the time does not, of course, prevent their reservation to the United States under § 9 of the Stock Raising Homestead Act if they otherwise qualify as "minerals" within the intendment of that provision. *See Rowe v. Chesapeake Mineral Co.*, 156 F.2d 752, 755 (6th Cir. 1946), *cert. den.*, 329 U.S. 776 (1946); *New Mexico and Arizona Land Company v. Elkins*, 137 F.Supp. 767, 771-773 (D. N.M. 1956); *Cain v. Neumann*, 316 S.W.2d 915, 922 (Civ.App. Tex. 1958); 1 American Law of Mining § 3.23 (1972). *But see State of Wyoming v. Udall*, 379 F.2d 635, 638 (10th Cir. 1967), *cert. den.*, 389 U.S. 985 (1967); *Ahne v. Reinhart and Donovan Company*, 240 Ark. 691, 401 S.W. 2d 565, 569 (Ark. 1966).

Since it is clear that Congress expressed no intent on the question of whether "other minerals" in § 9 of the Act included geothermal steam and associated geothermal resources, the Government must press the contention that the main constituent of geothermal energy, namely superheated water (or steam) was a "mineral" within the contemplation of Congress and the meaning of the mineral reservation in § 9. Such a construction will not hold water: the authorities are convincing that water was not considered a mineral when § 9 was enacted, nor is water considered a mineral today.

The word "mineral" is used in many senses and does not have a single definite meaning. *Bumpus v. United States,* 325 F.2d 264, 266 (10th Cir. 1963). In its broadest sense "mineral" encompasses that vast realm of everything other than animal or vegetable. A dictionary current at the time of the enactment of the Act defined "mineral" broadly enough to include water:

> 1. An inorganic homogeneous substance of definite or approximately definite chemical composition, found in nature.
>
> Minerals, though commonly solid, may exist in a gaseous, liquid, or viscid state. Water is a mineral that solidifies at 32° Fahrenheit. Funk & Wagnalls New Standard Dictionary of the English Language (1913 ed.).

It is not this general meaning that is controlling, however, for the word mineral is necessarily subject to interpretation by reason of its context and particular usage. Thus the following approach has been adopted:

> We are of the opinion that in deciding whether or not in a particular case exceptional substances are minerals that the true test is what that word means in the vernacular of the mining and mineral industry, the commercial world and the landowners at the time of the grant, and whether the particular substance was so regarded as a mineral. *Fleming Foundation v. Texaco,* 337 S.W. 2d 846, 852 (Civ.App. Tex. 1960).

See also Thomas v. Markham & Brown, Inc., 353 F.Supp. 498, 501 (E.D. Ark. 1973); *Mack Oil Company v. Laurence,* 389 P.2d 955, 961 (Okla. 1964).

The strong weight of the authority is that water was not considered to be a mineral, within the test just stated, either when the Stock Raising Homestead Act was enacted or when the subject patents were granted thereunder.[15]

One contemporaneous authority defined mineral as follows:

> Mineral is any constituent of the earth's crust, more especially an inorganic body, occurring in nature homogeneous and having a definite chemical composition which can be expressed by a chemical formula, and having certain distinguishing characteristics, and which is capable of being got from the earth for the purpose of profit. Ricketts on Mines § 99 (1911).

Another offered this definition:

> The real test seems to be the character of the deposit as occurring independently of the mere soil, valuable in itself for commercial purposes, that is, near enough to a market to have a value. [Footnote omitted.] 1 Lindley § 93.

In its listing of minerals, Lindley does not include water. 3 Lindley at 2740-2741.

A review of the United States Geological Survey's annual Mineral Resources of the United States for both metals and nonmetals for the years 1913, 1914 and 1916 (published respectively in 1914, 1917 and 1919) shows no listing for water, salt water, steam, or geothermal resources. There is a similar absence of listings in G. English, Descriptive List of the New Minerals 1892-1938 (1939), a book which updated Dana's System of Mineralogy (6th ed. 1892). And the only listing in Eakle, Min-

15. *But see Hathorn v. Natural Carbonic Gas Co.,* 194 N.Y. 326, 87 N.E. 504 *passim* (N.Y. 1909), and cases cited therein.

erals of California (State Mining Bureau, Bull. No. 67, 1914) is for water in the form of mineral springs. *Id.* at 63.

A strong line of authority supports the view that today water is still not considered a mineral. *See Mack Oil Company v. Laurence, supra* at 961 (reservation of "all the minerals" held not to include subterranean waters); *Fleming Foundation v. Texaco, supra* at 852 (reservation of interest "in all of oil, gas and other minerals in, under and that may be produced from the land conveyed" held not to include subsurface water); *Vogel v. Cobb,* 141 P.2d 276, 280 (Okla. 1943) (conveyance of "oil, petroleum, gas, coal, asphalt and all other minerals of every kind or character in and under and that may be produced from said real property" and conveyance of all "oil, gas and other minerals in and under and that may be produced from" said land held not to include water under "other minerals"); *Stephen Hays Estate v. Togliatti,* 85 Utah 137, 38 P.2d 1066, 1068 (Utah 1934) (exception of "all minerals on or in the land conveyed" held not to include water containing copper in solution); 54 Am.Jur.2d "Mines and Minerals" § 9; Palache, Berman, Frondel, Dana's System of Mineralogy (7th ed. rewritten 1951) (no listing for water, salt water, steam, or geothermal steam). *But see* Note "Acquisition of Geothermal Rights" 1 Idaho L. Rev. 49, 56-57 (1964).

The matter is summarized in 1 Williams & Meyers, Oil and Gas Law § 219.6 (1972):

> Certainly water has been described as a "mineral" in certain contexts, [footnote omitted] but we are doubtful that in the ordinary mineral grant or reservation or mineral lease that the parties contemplate that water is described by the term "minerals." Under these circumstances we are led to the conclusion that very slight intrinsic evidence in the instrument should be sufficient to establish that water was not included in the term minerals as used by the parties. * * *

The conclusions reached above are strengthened by reference to interpretations of the Act and the mineral reservation therein by the Department of the Interior, the agency charged with administration of the Act.

It is evident that since 1961 the Department of the Interior has held and disseminated the opinion that geothermal steam and associated geothermal resources are not minerals. In 1961 the Acting Solicitor of the Department of the Interior wrote a memorandum to the Director of the Bureau of Land Management expressing the view that the Department lacked authority to dispose of geothermal steam contained in public lands under the Materials Act of 1947. Dept. of Int. Mem. M-36625 (Aug. 28, 1961).

With specific reference to mineral reservations under the Stock Raising Homestead Act, in 1965 the Office of the Solicitor expressed the view in two opinion letters that geothermal steam is merely superheated water, that water has not been treated as a mineral in public land laws, and that as a result mineral reservations under the Act do not include geothermal steam. The letter to Mrs. H. S. Gilmore of Sacramento recited that,

> A party holding land under a patent issued pursuant to the Stock-Raising Homestead Act would thus have the undisputed right to produce geothermal steam energy from his land. 3 Code Cong. & Adm. News 5126 (91st Cong., 2d Sess., 1970).

The second letter, to Mr. Walter P. Capaccioli of South San Francisco, concluded that,

> As we have pointed out in answer to your first question, geothermal steam is not a mineral within the meaning of the public land laws. Hence, it is subject neither to the general mineral reservation of the Stock-Raising Homestead Act nor to location under the mining law. *Id.* at 5128.

For full text of these letters see Appendix A hereto.

The letter to Mr. Capaccioli referred to land owned by the Ottobonis, who are named as defendants in the instant action.

The same interpretation was given in a letter dated February 16, 1966, from the Department's Associate Solicitor for Public Lands to counsel for defendant Magma Power Company.

The Department of the Interior continued to adhere to the above opinions in a letter from the Assistant Secretary of the Interior to Congressman Wayne N. Aspinall, Chairman of the Committee on Interior and Insular Affairs of the House of Representatives, dated August 31, 1970, and cited in 3 Code Cong. & Adm. News 5121 (91st Cong., 2d Sess., 1970).

In addition, the Department of the Interior has taken the position in letters to members of Congress that geothermal steam is not locatable. It appears from the language of § 9 of the Act that Congress was concerned with reserving locatable minerals only, and since geothermal resources are not locatable within the meaning of the mining laws, they were not reserved.

The foregoing consistent expressions from the Department of the Interior must be given that weight due an agency's interpretations of its governing laws. As recently stated by the Supreme Court in *Investment Co. Institute v. Camp,* 401 U.S. 617, 626-627 (1971):

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.

This rule applies with equal force to interpretations expressed by the Department of the Interior. *See Udall v. Tallman,* 380 U.S. 1, 4, 16 (1965); *Knowles v. Butz,* 358 F.Supp. 228, 231 (N.D. Cal. 1973).

Here, the above interpretations not only strike this court as eminently reasonable, but well within the weight of authority on the issues presented thereunder. The interpretations of the Department are supported by the pertinent provisions of the Act and are not contrary to the expressed (or interpreted) intent of Congress. Accordingly, this court will accord such interpretation the "due deference" and "great weight" called for by the cases.

In view of the foregoing, this court need not reach the question of whether the facts here give rise to a claim of estoppel against the Government within the narrow ambit of that doctrine as expressed in such cases as *Manloading & Management Assoc. Inc. v. United States,* 461 F.2d 1299, 1303 (Ct. Cl. 1972) and *United States v. Georgia-Pacific Company,* 421 F.2d 92, 95 *passim* (9th Cir. 1970).

III. CONCLUSION

For the reasons given above, defendants' motion to dismiss for failure to state a claim upon which relief can be founded is hereby GRANTED, and plaintiff's motion for summary judgment in its favor is hereby DENIED. It is so ordered.

DATED: October 30, 1973.

GEORGE B. HARRIS
United States District Judge

Appendix A

[To Memorandum of Decision]

The two letters reproduced below are cited in 3 U.S. Code Cong. & Adm. News 5126-5128 (91st Cong., 2d Sess., 1970.).

U.S. Department of the Interior
Office of the Solicitor
Washington, D.C. December 16, 1965.

Mrs. H. S. Gilmore,
Gilmore & Gilmore
1005 Eighth Street, Sacramento, Calif.

Dear Mrs. Gilmore: The Director of the Bureau of Land Management has referred your letter of October 5, 1965, regarding geothermal steam resources to our Office. Your primary question is whether geothermal steam has been reserved to the United States in lands patented under the Stock Raising Homestead Act (43 U.S.C. 291-301), section 9 of which (43 U.S.C. 299) provides that "* * * patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so patented * * *."

Geothermal steam is essentially just subterranean water heated to a high temperature. In *Solicitor's Opinion M-36625* (August 28, 1961) it was stated that "from an examination of the pertinent sections of a report prepared for a United Nations Conference by the Geological Survey entitled 'Preliminary Evaluation of Geothermal Areas by Geochemistry, Geology, and Shallow Drilling,' we conclude that geothermal steam is developed from hot spring systems and that the greatly dominant component to these systems is meteoric water, that is, of atmospheric origin."

Water, particularly subterranean water, is normally classified as a mineral. See article on "Mineralogy" in *Encyclopaedia Brittanica,* XV 501 (1965); "Water" 93 *C.J.S.* 580; "Mines and Minerals,"

§ 2(b) (7), 58 *C.J.S.* 24; *Hathorn v. Natural Carbonic Gas Co.,* 87 N.E. 504, 508 (N.Y. 1909). However, it is recognized that water differs from other minerals and must be treated differently from a legal point of view. *Erickson v. Crookston Water, Power & Light Co.,* 111 N.W. 391, 393 (Minn. 1907). Courts have held that a reservation of minerals does not reserve water. *Fleming Foundation v. Texaco,* 337 S.W.2d 846, 850 (Tex. 1960); *Mack Oil Co. v. Laurence,* 389 P.2d 955, 961 (Okla. 1964); see charge of the court in *Estate of Genevra O'Brien v. United States,* 8 Oil and Gas Reporter § 45; 846 (U.S.D.C., N.D.Tex. 1957).

Water has not been treated as a mineral in the public land laws. The Congress has enacted special statutes about water, and to the best of our knowledge there is no statute in which water is treated as a mineral. As we have concluded that geothermal steam is really water, it would thus be anomalous to assert that geothermal steam was subject to the mineral reservation of the Stock-Raising Homestead Act, and the answer to your question must consequently be that the reservation does not cover geothermal steam.

A party holding land under a patent issued pursuant to the Stock-Raising Homestead Act would thus have the undisputed right to produce geothermal steam energy from his land. Any minerals connected with the geothermal steam would, however, appear to be subject to the mineral reservation. Title to them would be in the United States, and the patentee could not acquire title to them by producing geothermal steam.

It is also possible that Executive Order No. 5389 of July 7, 1930, may affect some land patented under the Stock Raising Homestead Act. By Executive Order 5389 the President is deemed to have withdrawn the waters of hot springs and springs the waters of which have curative properties, and also the land containing them. The purpose of the withdrawal was to preserve these springs for general public use and benefit in order that they might be leased under the act of March 3, 1925 (43 Stat. 1133; 43 U.S.C.

971), and the pertinent regulations, 43 CFR 2321.1-2(b). The withdrawal by this Executive order is a continuing one and attaches to any lands which at the time of its issuance were, or which subsequently become, of the character and status defined in the order. Cf. *State of New Mexico,* 55 I.D. 466 (1936).

Under that order it would seem quite possible that, if any land containing hot springs was patented subsequent to the promulgation of Executive Order 5389, its conveyance by the United States to the patentee was unauthorized. However, before we comment further on such matters, it would be necessary to have full factual information about each particular case.

Sincerely yours,

Edward Weinberg,
Deputy Solicitor.

U. S. Department of the Interior,
Office of the Secretary,
Washington, D. C., December 16, 1965.

Mr. Walter P. Capaccioli,
384 Grand Avenue, Post Office Box 876,
South San Francisco, Calif.

Dear Mr. Capaccioli: Assistant Secretary Cain has asked that we reply to your letter of August 27, 1965, in which you ask several questions about geothermal steam in lands patented with a mineral reservation under the Stock-Raising Homestead Act (43 U.S.C. 291-301). Section 9 of that statute (43 U.S.C. 299) provides that "* * * patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so * * * patented * * *" Your primary question is whether geothermal steam has been reserved to the United States by such a reservation.

Geothermal steam is essentially just subterranean water heated to a high temperature. In *Solicitor's Opinion M-36625* (August 28, 1961), it was stated that "from an examination of the pertinent sections of a report prepared for a United Nations Conference by the Geological Survey entitled 'Preliminary Evaluation of Geothermal Areas by Geochemistry, Geology, and Shallow Drilling,' we conclude that geothermal steam is developed from hot spring systems and that the greatly dominant component in these systems is meteoric water, i.e., of atmospheric origin.

Water, particularly subterranean water, is normally classified as a mineral. See article on "Mineralogy" in *Encyclopaedia Brittanica,* XV 501 (1965); "Water" 93 (*C.J.S.* 580; "Mines and Minerals," § 2(b)(7), 58 *C.J.S.* 24; *Hathorn v. Natural Carbonic Gas Co.*, 87 N.E. 504, 508 (N.Y. 1909). However, it is recognized that water differs from other minerals and must be treated differently legally. *Erickson v. Crookston Water, Power & Light Co.,*

111 N.W. 391, 393 (Minn. 1907). Courts have held that a reservation of minerals does not reserve water. *Fleming Foundation v. Texaco,* 337 S.W.2d 846, 850 (Tex. 1960); *Mack Oil Co. v. Laurence,* 389 P.2d 955, 961 (Okla. 1964); see charge of the court in *Estate of Genevra O'Brien v. United States,* 8 Oil & Gas Reporter 845, 846 (U.S.D.C., N.D.Tex. 1957).

Water has not been treated as a mineral in the public land laws. The Congress has enacted special statutes about water, and, to the best of our knowledge, there is no statute in which water is treated as a mineral. As we have concluded that geothermal steam is really water, it would, thus, be anomalous to assert that geothermal steam was subject to the mineral reservation of the Stock-Raising Homestead Act, and the answer to your first question must, consequently, be that the reservation does not cover geothermal steam.

Your second question is whether Executive Order No. 5389 of July 7, 1930, affects your clients' land. Your clients purchased the land in 1941 from a party which had obtained it from the United States under the Stock-Raising Homestead Act on July 16, 1931. By Executive Order 5389, the President is deemed to have withdrawn the waters of the hot springs and springs the waters of which have curative properties and the land containing them. The purpose of the withdrawal was to preserve these springs for general public use and benefit in order that they might be leased under the act of March 3, 1925 (43 Stat. 1133; 43 U.S.C., sec. 971) and the pertinent regulations, 43 CFR 2321.1-2(b). The withdrawal by this Executive order is a continuing one and attaches to any lands which at the time of its issuance were, or which subsequently become, of the character and status defined in the order. Cf. *State of New Mexico,* 55 I.D. 466 (1936).

Under that Executive order it would seem that, if the land held by your clients contains hot springs, it should not have been conveyed to their predecessors in interest under the Stock-Raising

Homestead Act. However, we do not have full information about your clients' land at this time. We do not, for example, know what the actual conditions on the land were at the time the patent was issued. Consequently, we are unable to determine whether or not the land was properly patentable under the Stock-Raising Homestead Act.

The answer to your third question is that the legislation under consideration applies solely to geothermal steam owned by the United States.

As we have pointed out in answer to your first question, geothermal steam is not a mineral within the meaning of the public land laws. Hence, it is subject neither to the general mineral reservation of the Stock-Raising Homestead Act nor to location under the mining law.

In view of our answers to your first four questions, the answer to both your fifth and your sixth questions is that your clients presumably own the geothermal steam in their land.

Sincerely yours,

Edward Weinberg,
Deputy Solicitor

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 74-1574

United States of America,
Plaintiff-Appellant,
v.
Union Oil Company of California, et al.,
Defendants-Appellees.

ORDER

[March 23, 1977]

Before: BROWNING and WALLACE, Circuit Judges, and *TURRENTINE, District Judge

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing in banc.

The full court has been advised of the suggestions for in banc rehearing, and no judge of the court has requested a vote on the suggestions for rehearing in banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing in banc are rejected.

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*Honorable Howard B. Turrentine, United States District Judge, Southern District of California, sitting by designation.

Appendix D

In the United States Court of Appeals
for the Ninth Circuit

No. 74-1574

United States of America,
Plaintiff-Appellant,
vs.
Union Oil Company of California, et al.,
Defendants-Appellees.

Stipulation for Stay of Mandate

Plaintiff-appellant United States of America and defendants-appellees Union Oil Company of California, Magma Power Company and Thermal Power Company, by their undersigned attorneys of record, stipulate as follows:

Considering that this litigation was instituted as a test case, for the purpose of obtaining a final decision of a court of last resort on important questions of statutory construction on which there was, and is, sharp difference of opinion:

Considering that the final judgment herein will govern the result not only between the immediate parties but also with respect to persons not parties;

Considering that whichever party received an adverse decision in this Court, that party would likely apply to the Supreme Court of the United States for a writ of certiorari, contending that the issues are important and should be reviewed by that Court;

Considering that the complexities of this case furnish good cause for allowing the full 90-day period contemplated by 28 U.S.C. 2101(c) for preparation and filing of a petition for a writ of certiorari;

IT IS STIPULATED AND AGREED that an order may be entered herein, pursuant to Fed.R.App.Proc. Rule 41(b), without bond or other security, staying the mandate of this Court, until a date ninety (90) days after the entry of the order of this Court denying the petition of defendants-appellees for a rehearing, to enable the defendants-appellees to prepare and file a petition for a writ of certiorari in the Supreme Court of the United States.

Dated: March 28, 1977.

DAVID E. GOLAY
Assistant United States Attorney
For the United States of America

MOSES LASKY
For Union Oil Company of California, Magma Power Company and Thermal Power Company

Appendix E

JAMES L. BROWNING, JR.
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United States District Court for the Northern District of California

Civil No. 72-1866 GBH

United States of America,
Plaintiff,

v.

Union Oil Company of California, a California corporation, Magma Power Company, a Nevada corporation, Thermal Power Company, a California corporation, Albert E. Ottoboni, David Ferrari, Emma Ottoboni, Louis Ottoboni, Elmer Ferrari, Ilva Giampaoli, Ceaser Giannecceini, John Giampaoli, Peter Mazzanti, Enes Mazzanti, his wife, Ione J. Ottoboni Pellegrini, Patricia Ottoboni, James Ottoboni, Louise Carolyn Ottoboni Johnson, Alex C. Beigel, Helen V. Dillingham, Frances W. Vought, American Securities, and Northwestern Mutual Life Insurance Company and Unknown Owners,
Defendants.

COMPLAINT

Comes now the plaintiff, the United States of America, by James L. Browning, Jr., United States Attorney, at the request of the Secretary of the Interior of the United States, and upon direction of the Attorney General of the United States, and complains of the defendants, and alleges as follows:

FIRST CAUSE OF ACTION

1. This is a civil action brought by the United States in its sovereign capacity, and the jurisdiction of this Court is invoked under 28 U.S.C. 1345.

2. That the real property which is the subject of this action is located within the territorial jurisdiction of this Court.

3. That on September 15, 1926, the United States of America, pursuant to the terms of the Stock Raising Homestead Act, 43 U.S.C. secs. 291-302, by patent no. 985338, granted to William T. Kidd certain lands situated in the County of Sonoma, State of California, described as follows:

> E ½ of SE ¼ of sec. 28; lot 1 of sec. 32; lots 3, 4, and 12, and the NW ¼ of NE ¼ of sec. 33; all of T. 11 N., R. 8 W., MDB&M, California;

reserving to the United States all coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Stock Raising Homestead Act.

4. That through mesne conveyances, defendants (Alex C. Beigel, Helen V. Dillingham and Frances W. Vought) acquired all right, title, and interest granted by the United States to William T. Kidd in the lands described in Paragraph 3 of this Complaint.

5. That on April 7, 1959, defendants Alex C. Beigel, and his wife, Anita W. Beigel, executed a lease and agreement with defendant Magma Power Company, and on February 20, 1962,

defendants Helen V. Dillingham and Frances W. Vought executed a supplement to the aforesaid lease and agreement, for the production and sale of geothermal steam and power, and for the extraction of by-products thereof, including in part the lands described in Paragraph 3 of this Complaint.

6. That on July 16, 1931, the United States of America, pursuant to the terms of the Stock Raising Homestead Act, 43 U.S.C. sec. 291-302, by patent no. 1048006, granted to Willis J. King certain lands situated in the County of Sonoma, State of California, described as follows:

> Lot 13 of sec. 1, lots 5, 12, 13, 14, 15 and 16 of sec. 2; lots 1, 2, and 3 of sec. 11; and lots 3, 4, 5, 6, 7 and 11 of sec. 12; all of T. 11 N., R. 9 W., MDB&M, California;

reserving to the United States all coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Stock Raising Homestead Act.

7. That through mesne conveyances, defendants (Albert E. Ottoboni, David Ferrari, Emma Ottoboni, Louis Ottoboni, Elmer Ferrari, Ilva Giampaoli, Ceaser Giannecceini, John Giampaoli, Peter Mazzanti, Enes Mazzanti, his wife, Ione J. Ottoboni Pellegrini, Patricia Ottoboni, James Ottoboni, and Louise Carolyn Ottoboni Johnson), acquired all right, title, and interest granted by the United States to Willis J. King in the lands described in Paragraph 6.

8. That on October 1, 1965, defendants described in Paragraph 7 of this Complaint, or their predecessors in interest, executed a memorandum of lease and agreement with Earth Energy, Inc., for the exploration and development of natural geothermal steam, natural heat of the earth, geothermal energy and extractable minerals contained therein, including in part the lands described in Paragraph 6 of this Complaint.

9. That through mesne assignments, defendants Union Oil Company of California and Magma Power Company and Thermal Power Company now each hold, an undivided one-half interest in and to all right, title, and interest and to the geothermal resource leases described in Paragraphs 5 and 8 of this Complaint.

10. That plaintiff has been, and now is, the owner of the geothermal steam and associated geothermal resources in the lands described in Paragraph 3 and 6 of this Complaint by virtue of the mineral reservation to the United States in accordance with the terms of the Stock Raising Homestead Act.

11. That the defendants have been, and now are, in possession of and producing, or about to produce, geothermal steam and associated geothermal resources in the aforesaid lands and have wrongfully withheld and do now wrongfully withhold possession and use thereof from the plaintiff.

12. That plaintiff demanded of and from the defendants possession and use of the geothermal steam and associated geothermal resources in the aforesaid lands; that the defendants, and each of them, have failed, neglected, and refused, and still fail, neglect, and refuse to surrender possession and use thereof to plaintiff, and continue to use geothermal steam and associated geothermal resources in the aforesaid lands contrary to law and against the will of plaintiff and without its permission or consent.

SECOND CAUSE OF ACTION

13. Plaintiff incorporates by reference all of Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of plaintiff's first cause of action, and makes them a part hereof as so fully set forth herein to this point.

14. That plaintiff has been damaged by the unlawful leasing for and production of geothermal steam and associated geothermal resources in the amount of the reasonable rental value of the aforesaid lands so leased and of the reasonable royalty of the geothermal steam and associated geothermal resources

produced therefrom, in accordance with the rental and royalty provisions of the Geothermal Steam Act of 1970, 30 U.S.C. secs. 1001 *et seq.*, and regulations promulgated pursuant thereto, for the period commencing with the possession and occupancy as described in Paragraphs 5 and 8 of this Complaint, and extending until such time as the aforesaid lands are subject to geothermal leases under the terms of the Geothermal Steam Act of 1970.

15. That the exact amount of the reasonable rental value and royalty for the use and occupancy of the geothermal steam and associated geothermal resources in the aforesaid lands by each defendant is unknown to plaintiff at this time, but will be ascertained and set forth herein by way of amendment within such time prior to trial that the defendants will have reasonable opportunity to prepare their defense, if any, thereto.

WHEREFORE, plaintiff prays for judgment herein against the defendants, and each of them, as follows:

1. That it be declared that the possession and use of the defendants, and each of them, is, and at all times herein mentioned has been, without any right, title or interest in and to the geothermal steam and associated geothermal resources in the lands described herein and that plaintiff's title to said geothermal steam and associated resources be quieted.

2. That the production of geothermal steam and associated geothermal resources in the lands described herein be enjoined otherwise than under the terms of the Geothermal Steam Act of 1970.

3. That plaintiff have and be awarded damages against the defendants in the amount of the reasonable rental value of the lands described herein for geothermal steam and associated geothermal resources and the reasonable royalty value of the production of geothermal steam and associated geothermal resources therefrom, for the period commencing with a respective unlawful

occupancies and extending until such time as the lands described herein are subject to geothermal leases under the terms of the Geothermal Steam Act of 1970.

4. That plaintiff be granted all further and general relief as the Court may deem just and proper in the premises;

5. That plaintiff be awarded its cost expended thereon.

DATED: October 13, 1972.

JAMES L. BROWNING, JR.

James L. Browning, Jr.
United States Attorney

Appendix F

In the United States District Court
for the Northern District of California

(Rule 58, F.R.Civ.P.)

C72-1866GBH

United States of America,
Plaintiff,

v.

Union Oil Company of California,
a California corporation, et al.,
Defendants.

JUDGMENT OF DISMISSAL

The Court having on October 30, 1973, rendered its Memorandum of Decision granting defendants' consolidated Motions to Dismiss this action for failure to state a claim upon which relief can be granted;

IT IS ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby dismissed.

DATED: November 14, 1973

GEORGE B. HARRIS
United States District Judge
Northern District of California